162 US 313

TRANSCRIPT OF RECORD.

162-313

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 681.

JOHN STEVENSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED JULY 29, 1895.

(15971.)

by the Court, under the doctrine of *Bronson* v. *Rodes*, as not really distinguishable from a contract in terms for the delivery of so much bullion.

IV.

If it should be held that this Court has jurisdiction to review the decision of the Court below upon the construction and effect of the State statute under which the bonds purported to be issued, it is respectfully submitted that the decision was correct under the settled principles of the law of Mississippi applicable to the subject, as known to this Court, and the doctrines enunciated and applied by it, in numerous cases, involving questions upon the power of municipal corporations to put upon the money markets negotiable bonds, and which have been recently recognized and affirmed in *Barnum* v. *Okolona* (148 U. S., 393), and *Hedges* v. *Dixon County* (150 U. S., 182), above cited.

In *Barnum* v. *Okolona* the Court had occasion to consider independently the question decided by the Supreme Court of Mississippi in *Woodruff* v. *Okolona* (57 Miss., 809), inasmuch as the bonds, in that case, were acquired before the decision of the Supreme Court of the State was rendered; but the Court, speaking by Mr. Justice Shiras, said: "Still, even in such a case, the construction put upon a State statute by the Supreme Court of the State is entitled to our respectful consideration; and we do not hesitate to adopt it as a true construction in the present case, where we have reached the same conclusion upon an independent reading of the statute."

J. Hubley Ashton,
Of Counsel for the Louisville, New Orleans and Texas Railroad Company.

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INDEX.

	Original.	Print.
Caption	1	1
Order to file indictments	2	1
Indictment	3	1
Order beginning trial	6	3
Order discharging jury	7	3
Order beginning trial	8	4
Order continuing trial	9	4
Order continuing trial	10	5
Order concluding trial	11	5
Verdict	11	5
Motion for new trial	12	6
Amended motion for new trial	16	8
Order taking motion for new trial under advisement	26	12
Order denying new trial	26	12
Judgment and sentence	27	13
Bill of exceptions	28	13
Exception to testimony of Mrs. Joe Paul	28	13
B. D. Davidson	28	13
Ham, Scrivener, and Orton	29	14
C. B. Ladd	29	14
Exception to exclusion of Lindsay as a witness	30	14
Exceptions to refusal to charge	30	14
Testimony of Dr. T. C. Brannon	31	15
B. D. Davidson	32	15
C. B. Ladd	35	16
W. L. Roberson	37	17
Mrs. Sarah Paul	39	18
W. R. Bandy	40	19

	Original.	Print.
Bill of exceptions—Continued.		
Testimony of W. T. Harris	41	19
Mrs. R. C. Roberson	43	20
Mrs. Joe Paul	44	21
C. S. Hamm	44	21
E. H. Scrivener	44	21
J. E. Martin	45	21
Mrs. Auten	45	21
John Black	46	22
R. A. Smith	46	22
George Velandingham	47	22
Dr. C. C. Berry	47	22
Capt. E. D. Sneed	48	23
C. B. Ladd (in rebuttal)	49	23
Bluff Davidson (in rebuttal)	49	23
Statement and certificate of judge as to exceptions	49	23
Petition for writ of error	51	24
Assignment of errors	52	24
Citation	57	27
Clerk's certificate	59	28
Writ of error	60	28
Affidavit of plaintiff in error that he is too poor to pay for printing the record	62	29

1 Be it remembered that at a regular term of the honorable circuit court of the United States for the eastern district of Texas, begun and held at the court rooms of said court in the city of Paris, in the said district, on the first Monday, the same being the first day of April, in the year of our Lord eighteen hundred and ninety-five; present and presiding, Honorable David E. Bryant, U. S. district judge; and which court adjourned on the 17th day of July, 1895, the following cause came on for trial, to wit:

THE UNITED STATES
v.
JOHN STEVENSON.

2 Be it remembered that a regular term of the honorable circuit court of the United States for the eastern district of Texas was begun and holden at the court rooms of said court in the city of Paris, Texas, on this third Monday (the twentieth day) of November, A. D. 1893.

Present and presiding, Hon. David E. Bryant, judge.

Also present Hon. R. E. Hannay, U. S. attorney; Frank Lee, esq., assistant U. S. attorney; J. J. Dickerson, U. S. marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy, when the following proceedings were had, to wit:

FRIDAY, *December 1st, 1893.*

Court met pursuant to adjournment.

Presiding and present, Hon. D. E. Bryant, judge; R. E. Hannay, esq., U. S. attorney; Frank Lee, esq., assistant U. S. attorney; J. J. Dickerson, U. S. marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

* * * * * * *

This day came the grand jury and, a quorum being present, presented, in open court, the following bills of indictment, to wit:

THE UNITED STATES
v. Charge: Murder.
JOHN STEVENSON.

* * * * * * *

3 Each of which bills of indictment the clerk is ordered to file and enter on the proper dockets.

In the name and by the authority of the United States of America.

In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at Paris, Texas, within and for the district and circuit aforesaid, on the third Monday, the same being the twentieth day of November, in the year of our Lord eighteen hundred and ninety-three, and continued by adjournment to and including the first day of December, in the year of our Lord eighteen hundred and ninety-three.

Eastern district of Texas, sct. The grand jurors of the United States of America, duly elected, empaneled, tried, sworn, and charged to inquire

into and due presentment make of offenses against the laws of the United States of America, in and for the district and circuit aforesaid, on their oath in said court present: That one John Stevenson, late of Chickasaw Nation, Pickens County, Indian Territory, in the district and circuit aforesaid, on the twenty-second day of August, in the year of our Lord eighteen hundred and ninety-three, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and con-
4 stituting a part of the said fifth circuit, and annexed to and constituting a part of the eastern district of Texas for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with his malice aforethought, and with a certain deadly weapon, to wit, a certain gun then and there held, make an assault in and upon the body of one Joe Gaines with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said John Stevenson did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said Joe Gaines, inflicting thereon a mortal wound, of which mortal wound the said Joe Gaines did then and there instantly die.

And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, used as aforesaid, and in the manner aforesaid, the said John Stevenson did unlawfully, feloniously, and with his malice aforethought, kill and murder the said Joe Gaines; the said Joe Gaines and he the said John Stevenson being then and there white persons and not Indians nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

C. M. RAGLAND,
Foreman of the Grand Jury.
FRANK LEE,
Asst. U. S. Attorney, Eastern District of Texas.

5 (Endorsed:) No. 535. The United States vs. John Stevenson. Offense, murder. A true bill. C. M. Ragland, foreman of the grand jury. U. S. witnesses:

Wm. T. Harris, Pauls Valley, I. T.
Wm. L. Robinson, " " " "
Wm. A. Bandy, " " " "
Clay C. Berry, " " " "
C. S. Hamm, " " " "
C. B. Ladd, Ardmore, I. T.
E. H. Scrivener, Pauls Valley, "
A. T. Gaines, Mt. Joy, Tex.

Returned and filed in open court, 1st day of December, 1893. C. Dart, clerk; by H. H. Kirkpatrick, deputy.

(Further endorsed:) U. S. witnesses—continued:

B. D. Davidson, Purcell, I. T.
Ben Stevenson, Pauls Valley, "
James Martin, " " "
Mrs. Tom Ventress, " " "
Mrs. W. L. Robinson, " " "
Mrs. Joe Paul, " " "

Ann Parmer (col.), Florence, Ala.
H. W. Schofield, Dallas, Tex.
Mrs. May Gaines, Oklahoma City, Ok.
Mrs. Paul, Pauls Valley.
Wm. Daugherty, Gainsville, Tex.
H. P. Ware, Gainsville, Tex.
Mrs. Mary Ware, " "

(Further endorsed:) We, the jury, find the defendant, John Stevenson, guilty of murder in Pickens County, Chickasaw Nation, Indian Territory, as charged in this indictment.

J. H. REEVES, *Foreman.*

APRIL 20TH, A. D. 1895.

6 Be it remembered that on the first Monday of April, A. D. 1895, the same being the first day of said month, there was begun and holden in the court rooms in the city of Paris, Texas, a regular term of the honorable circuit court of the United States for the eastern district of Texas, when the following proceedings were had, to wit:

TUESDAY, *April 16th, 1895.*

Court met pursuant to adjournment.
Present and presiding, D. E. Bryant, judge.

* * * * * * *

THE UNITED STATES
vs. } No. 535. Circuit court, criminal docket.
JOHN STEVENSON.

This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial, and the defendant, John Stevenson, in his own proper person and by attorneys, appeared and announced ready; and the said defendant being arraigned plead not guilty, and thereupon came a jury of twelve good and lawful men, to wit, T. S. Gaines, J. M. Bennett, D. W. Yarborough, W. P. Stockton, C. E. Terry, W. I. Ellett, W. T. Williamson, Smith Lee, J. J. Rhodes, R. H. Fredericks, J. A. Carter, and T. J. Simpson, who, having been duly tried, impaneled, and sworn as required by law, and having heard
7 the plea of the defendant, the evidence up to the hour of adjournment and the same not being concluded, the further consideration of this case was postponed until to-morrow and the jury was committed to the custody of the marshal and duly instructed and admonished by the court.

WEDNESDAY, *April 17th, 1895.*

Court met pursuant to adjournment.
Present and presiding, Hon. D. E. Bryant, judge.

* * * * * * *

THE UNITED STATES
vs. } No. 535. Circuit court, criminal docket.
JOHN STEVENSON.

This cause coming on this day to be further heard, came the United States, by her attorney, and announced ready, and the defendant, John

Stevenson, in his own proper person and by attorneys, appeared and announced ready, and thereupon came the jury of twelve good and lawful men, to wit, T. S. Gaines, J. M. Bennett, D. W. Yarborough, W. P. Stockton, C. E. Terry, W. I. Ellett, W. T. Williamson, Smith Lee, J. J. Rhodes, R. H. Fredericks, J. A. Carter, and T. J. Simpson, who, having been on yesterday duly tried, impaneled, and sworn, as required by law, and having heard the plea of the defendant and a part of the evidence,

8 and thereupon, on this day, it being made known to the court that one of the jurors aforesaid empaneled and sworn to try this cause, to wit, Smith Lee, is disqualified to try this cause because of having been a member of the grand jury that returned the bill of indictment in this case, and the defendant, by his counsel, objecting to proceeding further in the trial of this cause with the said juror on account of his incompetency as aforesaid, it is ordered that the jury be discharged from further consideration of this cause.

THE UNITED STATES
vs. } 535.
JOHN STEVENSON.

This cause coming on this day to be heard, came the United States by her attorney and announced ready for trial, and the defendant, John Stevenson, in his own proper person and by attorneys, appeared and announced ready, and the said John Stevenson, being arraigned, pleaded not guilty, and thereupon came a jury of twelve good and lawful men, to wit, J. H. Reeves, T. S. Gaines, J. M. Bennett, D. W. Yarborough, W. P. Stockton, C. E. Terry, W. I. Ellett, W. T. Williamson, J. J. Rhodes, R. H. Fredericks, J. A. Carter, and J. E. Bobo, each and all of whom were severally, face to face with the defendant, duly examined, tried, empaneled, and sworn, the defendant being accorded the privilege of participating in the examination as to the qualification of each juror and to p'remptorily challenge not exceeding twenty of the list, and thereupon the jury having been duly sworn as required by law to try this cause, the hour

9 of adjournment was at hand, and the jury was committed to the custody of the marshal and duly cautioned by the court, and the further consideration of this cause was postponed until to-morrow.

THE UNITED STATES
v. } 535.
JOHN STEVENSON.

The venire of petit jurors having been exhausted by challenge, it was ordered that the marshal summon thirty talesmen to complete the jury for trial of this cause, and thereupon J. E. Bobo was duly called, examined, tried, empaneled, and sworn as a juror to try this cause.

THURSDAY, *April 18th, 1895.*

Court met pursuant to adjournment.
Present and presiding, Hon. D. E. Bryant, judge.

* * * * * * *

THE UNITED STATES)
v.) 535.
JOHN STEVENSON.)

This day, this cause coming on further to be heard, came the jury of twelve good and law fulmen who were on yesterday duly tried, empaneled, and sworn, and the United States by the U. S. attorney appeared and the defendant in his own proper person and by attorneys appeared and the hearing of evidence was proceeded with before the court and jury and continued to the hour of adjournment, and not being concluded the further consideration of this cause was postponed until to-morrow and the jury continued in custody of the marshal under instructions of the court.

FRIDAY, *April 19th, 1895.*

Court met pursuant to adjournment.
Present and presiding, Hon. D. E. Bryant, judge.

* * * * * * *

THE UNITED STATES)
v.) 535.
JOHN STEVENSON.)

This day this cause coming on for further hearing, came the United States, by the U. S. Attorney, and the defendant in his own proper person and by attorneys came, and the hearing of this cause was continued before the court and jury, and the evidence and argument of counsel was concluded; and the hour of adjournment being at hand, the further consideration of this cause was postponed until to-morrow, and the jury was continued in custody of the marshal.

SATURDAY, *April 20th, 1895.*

Court met pursuant to adjournment.
Present and presiding, Hon. D. E. Bryant, judge.

* * * * * * *

THE UNITED STATES)
v.) 535.
JOHN STEVENSON.)

This day this cause coming on for further hearing, came the United States, by the U. S. attorney, and the defendant (who on a former day of this term was arraigned in this cause and pleaded not guilty), in his own proper person and by his attorneys, came, and thereupon came the jury of twelve good and lawful men, to wit, J. H. Reeves, T. S. Gaines, J. M. Bennett, D. W. Yarborough, W. P. Stockton, C. E. Terry, W. I. Ellett, W. T. Williamson, J. J. Rhodes, R. H. Fredericks, J. A. Carter, and J. E. Bobo, each and all of whom were (on a former day of this term of court) face to face with the defendant John Stevenson, duly examined, tried, empanelled, and sworn according to law to try this cause, the defendant being accorded the privilege of participating in the examination as to the qualification of each juror, and to p'remptorily challenge not exceeding twenty of the list of jurors, and the hearing of

the evidence and the argument of counsel having proceeded before the court and jury from day to day, and the jury having on this day received the charge of the court, retired to consider of their verdict, and on this same day came and returned into open court their verdict in words and figures following, to wit:

"We the jury find the defendant John Stevenson guilty of murder in Pickens County, Chickasaw Nation, Indian Territory, as charged in *in* this indictment.

"J. H. REEVES, *Foreman.*"

"APRIL 20TH, A. D. 1895.

12 It is therefore considered by the court that the defendant John Stevenson is guilty of murder in the Indian Territory as charged in the indictment and as found by the jury, and it is ordered that he be remanded to the custody of the marshal, and be by him committed to the jail of Lamar County to await the judgment and sentence of the court.

In the circuit court for the eastern district of Texas. Sitting at Paris, Texas, spring term, '95.

UNITED STATES *vs.* JOHN STEVENSON. } No. 535.

Now comes the defendant, John Stevenson, by his attorneys, and moves the court to set aside the verdict of the jury in the above numbered and entitled cause and grant him a new trial, and as grounds for this motion assigns the following, to wit:

1st. Because the verdict of the jury is not sustained by the evidence.

2nd. Because the verdict of the jury and the finding thereof is contrary to the law as given them in charge by the court.

3rd. Because the court erred in failing and refusing to submit to the jury a charge upon manslaughter, the Government witnesses, Harris, Bandy, and Robertson, having testified that "at the time the shot was fired the defendant was mad, nervous, and excited," evidently establishing the fact that at the time the shot was fired that the defendant was not in a proper state of mind for deliberation and cool reflection and was still laboring under heated passion and excitement of the former provocation.

13

4th. Because the proof showed that the defendant and the deceased were involved in a difficulty only a few moments before the homicide, and the court erred in not defining to the jury the law of cooling time.

5th. Because the court erred in excusing the juror, T. J. Simpson, from the jury on the account of sickness of said juror, on the second day of the trial of said cause, when said juror had been excepted by the defendant, and the trial had proceeded one entire day and to the conclusion of the Government's testimony, said defendant in person not agreeing to such action of the court, and that the agreement of defendant's counsel to excuse said juror was not binding upon the defendant in a capital case.

6th. Because the court erred in permitting the witness, Mrs. Joe Paul, to testify, over the objection of the defendant, that in May, 1893, before

the homicide on the 22nd day of August, "that she was at the National Hotel in Pauls Valley and heard the defendant say that he (defendant) intended to kill the next damned marshal that arrested him; that he was tired of being pulled around by them," when there was no evidence to show that at that time the defendant knew the deceased, or that at that time he was a marshal, nor was there any evidence showing that the defendant had ever been arrested or pulled around before.

7th. Because the court erred in permitting the Government
14 witness, B. D. Davidson, to testify, over the objections of the defendant, as to his acts as a commissioner, or that the deceased, Joe Gaines, was a deputy marshal for the court of Ardmore, I. T., the record of their appointment, oath, and bonds being the better legal evidence that could be introduced to establish that fact.

8th. Because the court erred in permitting the Government witnesses Ham, Scrivener, and Mrs. Orten to testify as to statements made by the defendant after the shooting, it being shown from the testimony that at the time the statements were made (if made at all) the defendant was under arrest and was not, previously to making said statements, warned by the officer in charge of him that any statement that he should make could be used in evidence against him and not for him. Nor was it shown that said statements were voluntarily made, the witness' stating on that point that if they were induced or called upon by anyone to make such statements they did not hear it, it being a matter of opinion only with said witness' that the statements were voluntary, when that was a fact to be proven clearly.

9th. Because the court erred in refusing to give the first special charge requested by the dft., as follows, to wit:

"That if the jury believe from the evidence that the deceased, Joe Gaines, fired upon the defendant with a pistol or was making a demonstration as to raise reasonably in the mind of the defendant the apprehension of immediate danger of his life or serious bodily harm, and that defendant acted under that apprehension and killed the deceased, that he would be acting in his own self-defense, and to acquit the defendant."

15 10th. Because the court erred in refusing to give the second special instruction requested by the defendant, as follows, to wit: "That if the jury believe from the evidence that the defendant did kill Joe Gaines, and if you further believe from the evidence that at the time of the killing the deceased was making such an attack upon the defendant as to produce a reasonable expectation or fear of death or some serious bodily harm, or if you believe from the evidence that at the time of the killing the deceased was threatening to take the life of the defendant and did then, by some act done, manifest his intention to execute the same, you will acquit. Nor is it necessary or required that the defendant should retreat or that the danger be actual and real, if such danger, under the circumstances surrounding the parties, reasonably appeared so to the defendant. The question is not one of actual danger but of reasonable apprehension of danger, and it is one which in all fairness can only be determined by the facts as they appeared to the defendant at the very time of the homicide."

FAGAN & BRENTS,
Attys. for Deft.

(Endorsed:) No. 535. The United States vs. John Stevenson. Deft.'s motion for a new trial. Filed April 22, 1895. C. Dart, clerk, by A. D. Brooks, deputy.

16 In the circuit court for the eastern district of Texas, sitting at Paris, Texas, spring term, 1895.

UNITED STATES
vs.
JOHN STEVENSON. } No. 535.

Now comes the defendant John Stevenson by his attorneys, and by leave of the court first had and obtained files this his amended motion for a new trial in lieu of and as a substitute for his original motion, filed in this cause on the 22 day of April, 1895, and moves the court to set aside the verdict of the jury in the above numbered and entitled cause, and grant him a new trial, and as grounds for this motion assigns the following, to wit:

1st. Because the verdict of the jury is not supported by the evidence and taken as a whole is not sufficient to convict.

2nd. Because the verdict of the jury and the finding thereof is contrary to the law as given them in charge by the court.

3rd. Because the court erred in failing and refusing to submit to the jury a charge upon manslaughter, the Government witnesses, Harris, Bandy, and Robinson having testified that "at the time the shot was fired that the defendant was mad, nervous, and excited," evidently establishing the fact that at the time the shot was fired that the defendant was not in a proper state of mind for deliberation and cool reflection, but was still laboring under heated passion and excitement of the former provocation, and that if said charge had been submitted a verdict

17 of murder would not have been returned.

4th. Because the proof showed that the defendant and the deceased were involved in a difficulty only a few moments before the homicide, and the court erred in not defining to the jury the law of cooling time.

5th. Because the court erred in excusing the juror T. J. Simpson from the jury on account of sickness of said juror on the second day of the trial of said cause, when said juror had been accepted by the defendant and the trial had proceeded one entire day and to the conclusion of the Government's testimony, said defendant in person not agreeing to such action of the court, and that the agreement of E. W. Fagan, one of defendant's counsel, to excuse said juror was not binding upon the defendant in a capital case.

6th. Because the court erred in permitting the witness Mrs. Joe Paul to testify over the objection of the defendant that "in May, 1893, before the homicide on the 22nd day of August, that she was at the National Hotel, in Pauls Valley, and heard the defendant say that he, defendant, intended to kill the next damned marshal/ that arrested him, that he was tired being pulled around by them," when there was no evidence to show that at that time the defendant knew the deceased, or that at that time he was a deputy marshal/, nor was there any evidence showing that the defendant had ever been arrested or pulled around before this time, or knew that Joe Gaines was a deputy mar.

7th. Because the court erred in permitting the Government
18 witness B. D. Davidson to testify over the objection of the defendant as to his acts as a commissioner, or that the deceased Joe Gaines was a deputy marshal/ for the court of Ardmore, I. T., the record of their appointment, oath, and bonds being the better legal evidence that could have been introduced to establish that fact.

8th. Because the court erred in permitting the Government witnesses Hamm, Scrivener, and Mrs. Orten to testify as to statements alleged to have been made by the defendant after the shooting, it being shown from the testimony that at the time the statements were made (if made at all) the defendant was under arrest, and was not previously to making said statements warned by the officer in charge of him that any statement he should make could be used in evidence against him and not for him. Nor was it shown that said statements were voluntarily made, the witnesses stating on that point that if they were induced or called upon by anyone to make said statements they did not hear it, it being a matter of opinion only with said witnesses that the statements were voluntary, when that was a fact to be clearly proven.

9th. Because the court erred in permitting the witness Mrs. Orten, over the objections of defendant, to testify in behalf of the Government in this cause, said witness never having been subpœnaed in said cause or her name endorsed upon the back of the indictment, or any notice whatever served up' the deft. of his counsel that she was a witness in said cause; said witness being brought to this court by a telegram, arriving in Paris up' the 3.40 train and placed upon the witness stand at
19 4 o'clock, twenty minutes after her arrival, neither the deft. or his counsel knowing that she was to be a witness or would be called on the witness stand, thereby denying the deft. the right or privilege of meeting her testimony.

10th. Because the court erred in refusing to give the first special charge requested by the defendant, as follows, to wit: "That if the jury believe from the evidence that the deceased, Joe Gaines, fired upon the defendant with a pistol, or was making a demonstration as to raise reasonably in the mind of the defendant the apprehension of immediate danger of his life or serious bodily harm, and that defendant acted under that apprehension and killed the deceased, that he would be acting in his own self-defense, and to acquit the defendant."

11th. Because the court erred in refusing to give the second special instruction requested by the defendant, as follows, to wit: "That if the jury believe from the evidence that the defendant did kill Joe Gaines, and if you further believe from the evidence that at the time of the killing the deceased was making such an attack upon the defendant as to produce a reasonable expectation or fear of death or some serious bodily harm, or if you believe from the evidence that at the time of the killing the deceased was threatening to take the life of the defendant, and did then, by some act done, manifest his intention to execute the same, you will acquit him. Nor is it necessary or required that the defendant should retreat, or that the danger be actual and real, if such danger, under
20 the circumstances surrounding the parties, reasonably appeared so to the defendant. The question is not one of actual danger, but

of reasonable apprehension of danger, and is one which in all fairness can only be determined by the facts as they appeared to the defendant at the very time of the homicide.

12th. Because the defendant has not had a fair and an impartial trial and has not been convicted upon sufficient legal testimony, but by an unprecedented oppression and steel-ribbed persecution of the deputy marshal/ force of this court; that the deputy marshals, Martin, Scrivener, and Lindsay, all Government witnesses, not only contributed their money to his prosecution, as detailed in their testimony in this cause, but the Government, through its attys., stated they did not want to use Lindsay as a witness, and asked that he be released from the rule; whereupon the defendant then asked that said Lindsay be sworn as a witness for him and placed under the rule, but the court refused to place said witness under the rule, stating that he was an officer of this court, and that the rule would not apply as to him, whereupon the witness, Lindsay, was permitted to sit beside the counsel for the Government in this case and before the jury and use all his abilities, willingness, & energies to procure the conviction of this defendant. Not only that, but said witness, Lindsay, a deputy marshal/ of this court and officer of this court, so far forgetting and transgressing his duties as an official of this court, went upon the public streets of the city of Paris during the trial of this case and prior to the rendition of the verdict of the jury in this case, and bet and
21 wagered with one Bill Lewis the sum of $120 that the jury would convict this deft., and that said witness Scrivener, another deputy marshal/ and officer of this court, held the stakes, or said sum of $120.00, awaiting the verdict in this cause, all of which this deft. can fully establish by the testimony of Bill Lewis, H. H. Lindsay, and E. H. Scrivener, if the court desires or will hear their testimony on this motion. All of which said conduct upon the part of said deputy marshal/s not only deserved the highest reprimand of this tribunal, but is enough to shock the conscience of this or any other court; that such unusual and unheard-of interest taken and exhibited by said deputy marshal/s to convict this defendant was a firebrand thrust by the Government into the jury box to inflame their passions and set on fire their reasons, and to lead them to a verdict of oppression in this cause.

13th. Because of the sickness of E. W. Fagan, the leading counsel of the defendant in this case, who for months prior to going into this case has been unable to attend to the duties of his office, and that during the trial of this case the said E. W. Fagan was taken sick, and that said trial had to be left in the hands of his associate counsel, who were unfamiliar with the facts of this case, and who never saw or knew anything of this case till called for trial, wherefore the deft. says he has not had a fair trial.

14th. Because the jury in their deliberations disregarded the testimony of Smith and Valandingham, believing that said Valandingham was not in town on said date, and that said Smith did not have the conver-
22 sation detailed by him, when in truth and fact each of said parties were there and testified to the truth, as is more fully sworn by the affidavits of citizens of Pauls Valley, hereto attached and made a part of this motion, marked Exhibits A, B, C, D.

15th. Because of newly discovered testimony as to this: That the witness B. D. Davidson testified that Stevenson did not offer to schedule any property on the bond of G. W. Mitchell, when the truth is that said Stevenson offered to schedule property thereon and sufficient to make said bond, and to deposit check therefor, as is more fully shown by affidavits marked E, F, which said testimony this deft. or his counsel did not know at the time of the trial of this cause, and could not have known by any diligence whatever.

16th. Because as to newly discovered evidence as to the good reputation of Capt. E. D. Sneed, Dr. Berry, R. A. Smith, and George Velandingham, as is more fully shown by the affidavits of a large number of the best citizens of Pauls Valley, as is more fully shown by affidavits hereto attached, marked Exhibit G and made a part of this motion; that deft. did not have said affiants subpœnaed in this cause for the reason that he never dreamed that the reputation of said witnesses would be assailed or attacked, and could not have known same by any dil/igence whatever.

17th. Because as to newly discovered evidence as to the bad reputation of C. B. Ladd, the leading Government witness in this case, which said testimony is fully shown by affidavits hereto attached, marked
23 H & I, which said testimony was unknown to this deft. or his counsel at the time of the trial of this case, for the reason that said affiants would never express themselves till after a conviction in this case.

18th. Because of the following newly discovered testimony, to wit: That of Irish Dan, William Shaw, and Jones Leferick.

By Irish Dan the deft. can prove that he was at the Central Hotel the night of the homicide, and that immediately after Stevenson was allowed to go home and after the deceased had returned from the Underwood drug store, that he heard a conversation between deceased, B. D. Davidson, & C. B. Ladd, in which it was the understanding that if defendant came back to town that the deceased was to kill him, and that said Davidson was to assist him, and looked for a gun for that purpose; that it was the agreed understanding between Davidson, Ladd, and Gaines that Gaines *that Gaines* was to kill deft. that night if he came back to town, and that when the two shots were fired in the street the deceased said, "There is the d——n son of a bitch now; I will go up and kill him." That said witness was last heard of at Davis, I. T., and is within the jurisdiction of this court and can be in attendance on this court at the next term.

By the witness Bill Shaw the defendant can prove that after the deceased entered the Central Hotel after deft. started home the deceased left said Central Hotel and went to the Underwood drug store and bought
a cigar from witness and heard deceased say to Smith that the
24 deft. would be back directly and that he intended to kill him; that said witness is now and has been at Memphis, Tenn., attending the medical school, but will return in about one month to Pauls Valley, within the jurisdiction of this court, when his testimony can be had on another trial of this case; that the testimony of this witness was not known either to deft. or his counsel at the time of the trial of this cause and could not have been known, as said witness refused to tell what he knew till after the conviction of this deft.

By the witness Jimmie Leferick the deft. can prove he was at the Central Hotel, and saw the witness George Velandingham there, and heard the same statements as detailed by the witness Velandingham; that said witness is now 25 miles from Pauls Valley, on the Rock Island R. R., and within the jurisdiction of this court, and that his testimony can be had on another trial of this cause; that deft. did not know of the testimony of these witnesses till after his conviction in this case, nor was the same known to his counsel, and could not have been known by any due diligence, as said witness', rather than attend court in this case, refused to tell what they knew till since his conviction aforesaid. Deft. says that they are each material witness' for him, and that on another trial he can establish the facts herein set out by each of said witnesses; that owing to a temporary absence of said witness' from Pauls Valley the deft. has been unable to procure the affidavits of said witnesses as exhibits in this case.

19th. Because the court erred in the last clause of its charge to
25 the jury, as follows: "It is simply a conscientious conviction with you as representatives of the law and representatives of right. If the evidence generates full conviction you have no right to shirk your duty, if it generates full conviction, that he is guilty, then you should convict him," said charge failing to instruct the jury that unless it does generate full conviction they should acquit the deft.

FAGAN & BRENTS,
Attys. for Deft.

(Signed) JOHN STEVENSON.

THE STATE OF TEXAS, *Lamar County:*

Before me, the undersigned authority, on this day personally appeared John Stevenson, the deft. in the above styled and numbered cause, who, after being duly sworn, says that he is familiar with the matters and things set forth in this motion, and that the same are true.

Sworn to and subscribed before me this June 18th, 1895.

H. H. KIRKPATRICK,
U. S. Commissioner.

(Endorsed:) 535. The United States vs. John Stevenson. Deft.'s amended motion for new trial. Filed June 18, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

26 WEDNESDAY, *June 19th, 1895.*

Court met pursuant to adjournment.

Present and presiding, Hon. D. E. Bryant, judge.

* * * * * * *

THE UNITED STATES }
v. } 535.
JOHN STEVENSON. }

This day came on to be heard defendant's motion for a new trial herein; the same being duly argued by counsel, was submitted to the court and taken under advisement and action deferred.

FRIDAY, *June 21st, 1895.*

Court met pursuant to adjournment.
Present and presiding, Hon. D. E. Bryant, judge.

* * * * * * *

THE UNITED STATES
v. } 535.
JOHN STEVENSON.

On this day came defendant's motion for a new trial herein, the court having formerly heard the evidence and argument of counsel herein, and the court being fully advised in the premises, as it is the opinion of the court that the law and the facts are against the defendant, and the motion is overruled and a new trial herein denied the defendant, whereupon, in open court, defendant excepts.

27 THE UNITED STATES
v. } 535.
JOHN STEVENSON.

On motion of S. Taliaferro, esq., attorney of the United States for the eastern district of Texas, the above-named defendant, John Stevenson, was this day brought to the bar of the court in custody of the marshal, and being asked by the court in open court if he had anything to say why the judgment and sentence of the court should not be pronounced upon him in accordance with the verdict of guilty returned by the jury in this cause on the 20th day of April, 1895, and the law in such cases made and provided; and no good cause being shown why the judgment and sentence of the court should not be pronounced herein:

It is therefore considered by the court that the defendant, John Stevenson, is guilty of murder as charged in the indictment and as found by the jury, and it is ordered, adjudged, and decreed by the court that the defendant, John Stevenson, be now remanded to the custody of the marshal of the United States for the eastern district of Texas, and be by him committed to the jail of Lamar County, Texas, and there kept securely confined until Friday, the 13th day of September, A. D. 1895, when, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, he, the said John Stevenson, shall be taken therefrom by the marshal aforesaid to the yard of the said jail, and then and there be by the marshal aforesaid hanged by the neck until he, the said John Stevenson, is dead.

And the clerk of this court is ordered to issue a death warrant
28 directed to the marshal aforesaid, commanding the due execution of this judgment and sentence according to law.

To which judgment of the court defendant then and there, in open court, excepted.

THE UNITED STATES
vs. } No. 535.
JOHN STEVENSON.

Bill of exceptions.

Be it remembered that on the trial of the above-entitled cause the court, over the objections of the defendant, permitted the Government

witness Mrs. Joe Paul to testify "that she was at the National Hotel, in Pauls Valley, and heard the defendant say, in May, 1893, that he intended to kill the next damned marshal that arrested him; that he was tired being pulled around by them," to which testimony the defendant at the time excepted and asked that their exceptions be entered upon the record in this cause, which was done.

2. Be it further remembered that on the trial of this cause the court, over the objection of the defendant, permitted the witness B. D. Davidson to testify as to the official position of himself and Joe Gaines, to which testimony the defendant at the time excepted.

29 3. Be it further remembered that on the trial of this cause the court, over the objection of the defendant, permitted the witnesses Ham, Scrivener, and Mrs. Orten to testify as to statements alleged to have been made by the defendant after the shooting, the defendant at the time being under arrest and not warned as to such statements or the same shown to have been voluntary, to which testimony the deft. at the time excepted.

4. Be it further remembered that on the trial of this cause the court permitted the witness Mrs. Orten to testify as to statements made by the deft., said witness never having been subpœnaed in said cause or her name endorsed on the back of the indictment, or any notice whatever served upon the defendant or his counsel that she was to be used as a witness in said cause.

5. Be it further remembered that on the trial of this cause the court, over the objection of defendant, permitted the Government witness C. B. Ladd to testify that he heard the Government witness W. L. Robertson say to the defendant, "Throw down your knife or Gaines will kill you," and that defendant threw the knife down, to which testimony the defendant at the time excepted and asked the same be entered and made a part of the record in this cause.

6. Be it further remembered that the defendant, before any taking of testimony in this cause and after an announcement of ready on

30 both sides, requested that the Government witness Lindsay (after the Government had stated they did not wish to use him) be sworn and placed under the rule as a witness for him, which the court refused to do, to which action of the court the defendant at the time excepted and asked that the same be made a part of the record herein.

7. Be it further remembered that the defendant, through his counsel, requested the court to submit to the jury a charge upon manslaughter, but the court refused to submit that issue to the jury, to which action of the court, in failing and refusing to submit to the jury such charge, the defendant at the time excepted, because the evidence clearly raised that issue that demanded a charge thereon.

8. Be it further remembered that the defendant requested the court to charge the jury in this case as follows, to wit: "That if the jury believe from the evidence that the deceased, Joe Gaines, fired upon the defendant with a pistol or was making a demonstration as to raise reasonably in the mind of the defendant the apprehension of immediate danger of his life or serious bodily harm, and that defendant acted under that apprehension and killed the deceased, that he would be acting in his own self-

defense and to acquit the defendant," which special charge the court refused to give and the defendant at the time excepted and asked this exception be entered upon the record in this cause.

9. Be it further remembered that the defendant requested the
31 court to charge in this cause as follows, to wit: "That if the jury believe from the evidence that the defendant did kill Joe Gaines, and if you further believe from the evidence that at the time of the killing the deceased was making such an attack upon the defendant as to produce a reasonable expectation or fear of death or some serious bodily harm, or if you believe from the evidence that at the time of the killing the deceased was threatening to take the life of the defendant and did then by some act done manifest his intention to execute the same you will acquit him. Nor is it necessary or required that the defendant should retreat or that the danger be actual and real, if such danger under the circumstances surrounding the parties reasonably appeared so to the defendant; the question is not one of actual danger, but of reasonable apprehension of danger, and is one, which in all fairness, can only be determined by the facts as they appeared to the defendant at the very time of the homicide," which charge the court refused to give and the defendant at the time excepted and tenders his bill and asks the same to be signed and made a part of the record in this cause.

10. Be it further remembered that on the trial of this cause the Government produced the following testimony to sustain the issue upon its part:

Dr. T. C. BRANNON.

I was called professionally to see Joe Gaines the night he was
32 killed. He was dead when I got to him. He was in the street in Pauls Valley, nearly in front of Bandy's billiard hall. There were two wounds upon him made by gun shot. The ball entered the left arm just below the wrist from the outside and passed through, going out about two inches above the wrist on inside of arm, and struck him in the left breast. Both wounds were made by the same bullet. The shot was fatal. Taking the range of the bullet that entered his arm from the outside and where it came out from the inside and where it struck his body, the deceased must have had his arm raised, close to him, slightly extended. If he had approached the open door to his left and turned, with his pistol in both hands in the act of firing, the wound could have been made in that way. I saw a forty-five caliber six-shooter by his left side, one chamber discharged. This was in Pauls Valley, Chickasaw Nation, August 22, 1893. Stevenson is a white man & noncitizen of Territory. If deceased had thrown up his arm as if to catch or ward off something, it would have been in position to have received the wound as I have before described.

B. D. DAVIDSON.

I am a lawyer by profession. I was U. S. commissioner for one of the Territory courts on the 22 August, 1893. I knew the defendant, Stevenson; was also acquainted with Joe Gaines at that time; he was holding the office of constable by appointment under the same court of which I was commissioner, and also was U. S. deputy marshal. I went to Pauls

Valley the 21st August to hold court, and was there on the 22nd,
33 the day Gaines was killed. The first I recollect of seeing Stevenson there that day was in the evening after I had gotten through my business and gone to the hotel. It was very warm, and I got a book and went to Bandy's place; he had an old cot back in the house. I laid down and thought I would read. George Mitchell, a man I had bound over that day and who had failed to make bond, came to me and asked me if I would take John Stevenson on the bond. I told him I would if he could justify; he brought Stevenson around. Stevenson told me he had some personal property; I don't know what it was now; did not amount to $500.00 above exemptions & liabilities. Told him he would have to schedule other property; seemed like he thought I ought to take a farm he had; it seemed he did not like it; he went off. The next time was in Bandy's place; I never spoke to him. That night after supper (I was boarding at the Central Hotel), think about 9 o'clock, I was talking to Mr. Shaw, the druggist, W. T. Harris, and Black, and probably someone else, and Mr. Stevenson came to the door and commenced cursing and abusing me for everything he could put his tongue to; he called me a damn lopsided son of a bitch, God-damned scrub, and says, "You took Tom Ventress on a bond, God damn you, when he could not schedule a horse." I told him I was no fighting man. He cursed me till, I suppose, he was satisfied. He compared me to other men that he said were honor beside of me; compared me to a man by the name of Schofield that had been up there for exposing his person; said he was an honor beside of me. He left, still cursing, and went south. I could still hear
him cursing and swearing. Gaines, the deceased, came in and
34 asked me what all this racket or fuss was about; I told him what had happened; he says, "I will go and arrest him and stop him." I told him if he arrested him to take him before Scott, at Ardmore, as it was a matter of his abusing me and I did not want to try a case of that kind; he said he would arrest him and hold him until morning, and he went on out. I don't know what was done out there. I heard some loud talking; the next I saw of him—I stayed in the house probably 5 or 10 minutes—when I went out I saw Gaines and Stevenson and a lady, whom I was told was Stevenson's wife, standing on the platform in front of the hotel talking and I passed by them and went on. As I walked in I heard Gaines tell Stevenson that if he would go home and go to bed and come back at 7 o'clock in the morning that he would release him. Stevenson and his wife then walked off. Some time after this, about 30 minutes, I heard 2 shots fired. Just as soon as Stevenson & his wife left Gaines came into the hotel and sat down in the front room of the hotel, and when the 2 shots were fired Gaines got up and walked across to the north side of the room and picked up his pistol from a sewing machine; he always laid his pistol there. Gaines said as he picked it up that he would go and get him and fasten him and would keep him in charge and not release him any more. He then walked out of the house and in about 2 minutes I heard 2 shots, sounded like one snapping your finger. This was north, up the street, toward Bandy's. I started to go and someone prevented me. I afterwards saw Gaines when brought to the hotel
dead; had two wounds, one in the arm, the other in the breast;
35 his coat sleeve had the appearance of being powder burned. Gaines stopped at the Central Hotel when in town. The defend-

ant did not offer to put up a check for the $50 bond; nothing of the sort occurred. I did not swear before the commissioner that the proposition was made by the deft. for him to go home and report next morning; if the commissioner got it that way he got it wrong.

C. B. LADD.

Know the defendant and knew the deceased during his lifetime. He was killed in Pauls Valley, Pickens County, Chickasaw Nation, on the night of August 22, 1893. I was running the Central Hotel at the time. I heard the defendant cursing Mr. Davidson that evening about some matters they had in court that day, something about a bond, I think. The defendant was talking in an ordinarily loud tone of voice; he was walking along the floor from the door back into house, a little then back to the door—kind of walking down towards Davidson like, then back to the door. The language was pretty tough; would not like to repeat it. Saw Mr. Gaines come to the defendant at the west end of the drug store. Stevenson had a knife in his hand and Gaines come up and asked him what was the matter; he told Stevenson if he did not behave he would have to arrest him. Stevenson caught him by the lapel or sleeve of the coat some way or other, I don't know how, with his left hand, and they talked back and forth. Stevenson had a knife in his hand. Roberson and Harris came up about that time. Heard Gaines tell
36 the defendant to go home and behave himself or he would have to arrest him; still holding to his coat, defendant said he was not afraid of any man and would not be run over. They stepped off towards Mr. W. L. Roberson and defendant turned deceased loose and Gaines threw his pistol on him, saying, "Drop your knife or I will kill you." He spoke this more than once. Then Roberson said, "John, throw down your knife; don't stand there and be murdered," and defendant threw the knife down. Gaines told Roberson to pick up the knife and help him along. Defendant says, "You have got the advantage of me; I will get even with you to-morrow," or something like that, and Gaines says, "If that is your game I will take you now." He called to Roberson; I believe he said he would deputize him to help him. I think Roberson took hold of him; I would not be positive. They went on towards the hotel. His, defendant's, wife came down there and they agreed with the officer if he would let him go home he would come back the next morning at 6 or 7 o'clock. The officer turned him loose and told him if he would go home and behave himself and come back the next morning he would let him go. Defendant and his wife then started off, and deft. said, "I will go home and get my gun and come back and make the son of a bitch hide out." Gaines at the time of this remark was standing at the door, after which he turned and walked back into the house. I then went into the room and was preparing to take a game of high five when I heard two gunshots fired and a voice exclaiming, "Hide out; Stevenson is on the streets." I don't think this was more than 20 or 30 minutes after the defendant had left my house.
37 At the time the shots were fired Gaines drew on his coat and says: "I will have to go and arrest that fellow and fasten him." He went to the sewing machine and got a pair of handcuffs. Just as soon as Gaines had time to get up there I heard what sounded like a long fire.

I went there and found Gaines dead in front of Bandy's saloon, about 8 or 10 feet from the sidewalk. A six-shooter was by his side. I noticed a pair of handcuffs there. I helped to dress the deceased. Judge Davidson heard all that was said. When the defendant left the drug store he went right round the alley like he was going home; John Black was with him. Black and Gaines was standing talking in a quiet way when Gaines came up. At the time Gaines approached them I was on a barrel 20 feet away and they were not talking loud enough for me to ascertain what was being said. At the time Gaines came up the defendant was behaving himself, standing there talking to Black. I did not see George Velandingham in Pauls Valley at all that day or night.

W. L. ROBERSON.

The first I saw of Gaines and the defendant that day or evening after the difficulty was about 9 o'clock, after dark. They were standing on the sidewalk back of D. C. Underwood's drug store. When I first heard Stevenson speak he said, "Don't draw that pistol; if you do I will cut you." They were standing on the sidewalk then. I walked in the middle of the street and said: "John, put up your knife and go home and behave yourself." They walked then over to where I was,
38 Stevenson holding with his left hand to Gaines' right arm. Stevenson was holding a knife in his right hand. After they came over to where I was Stevenson turned the officer loose, and as soon as he turned loose of Mr. Gaines and started off Gaines drew his pistol on him and told Stevenson to drop his knife or he would kill him; he walked a step or two towards Gaines. I said, "John, for God's sake, throw your knife down or he will kill you." He dropped his knife, and Gaines told me to take hold of him. I picked up the knife and then took hold of him. They kept quarrelling. Gaines said, "John, I am determined to take you." John says, "All right; I will go on with you." I went as far as the sidewalk, then I turned loose of Stevenson. He was going along quietly, and I went back to the drug store; was there some 10 or 15 minutes and saw Stevenson and his wife go back down the street from the direction of the hotel; heard defendant say, "Smith, give me your gun." Smith told him he did not have any. He says, "I will go home and get my Winchester and come back and I will make the son of a bitch hide out." He and his wife then walked on in the direction of his home. In about 30 minutes after this I heard two shots in the direction of the depot from Bandy's place of business, and heard Stevenson's voice say, "Hide out; Stevenson is in town yet." This must have been 30 or 40 yards from me. I then went out through the billiard hall. Most all who were in there, except Bandy, went out. We thought that he was probably mad, and we might get into some difficulty by staying there. After this I heard two more shots in quick succession at the billiard hall.

I opened the barber-shop door and saw Gaines lying in the street
39 flat of his back. He gasped once after I got to him, and died. There was a six-shooter lying by his side; saw nothing else there; saw no handcuffs there. At the time Gaines threw his pistol down on the defendant, the defendant had turned and was walking off from him. And while Stevenson had hold of the officer I heard him say to the officer, "Don't draw that gun or I will cut you." I did not go all the

way to the hotel with them. Stevenson seemed cooled down, although quarreling some, was my reason for leaving them, and because there no appearance of danger & my services no longer needed.

Mrs. SARAH PAUL.

I remember the occur'ance of Joe Gaines being killed. Saw Mr. Stevenson that night at my house. He walked into the room and spoke good evening. I asked him who he was; he said John Stevenson, Melindy McClure's husband. I asked him what he wanted; he made no reply, but looked around the room, picked up the gun, and started out. I tried to take the gun away from him, but could not. He told me not to be uneasy, he was just carrying the gun to his restaurant; that he nad no gun there, and wanted the gun for that night, and he did not know but what somebody might break in. I told him not to take the gun, but he went on with it. I tried to take the gun away from him, but could not. After that I heard a shot, but could not say in what direction. The gun belonged to my son, Buck Paul. I heard it was a Winchester gun.

40 W. R. BANDY.

Was in Pauls Valley the night Joe Gaines was killed; he was killed in front of my place of business. I saw defendant and deceased a little while before this in front of Underwood's drug store. Just before the killing I heard 2 shots fired 30 or 40 yards in the street in front of my billiard hall; 3 or 4 parties were in my place at the time. I also heard a voice saying Stevenson is in town. I thought the shots were being fired into the building and we all ran out the back way. I turned and walked back and Stevenson had stepped in the room. Mr. Jones and R. A. Smith were there; W. T. Harris and Dr. Berry were also there, I think, and Mr. E. D. Sneed. I think these parties were in front of the house at the time of the shooting. The building was 30 or 34 feet long by 18 feet wide; there was one large brass lamp suspended from the ceiling about the middle of the room and a reflection lamp on the rear wall; double doors in front of the house and two windows, one on the south of the door, the other north; building fronted east. The windows were ordinary size. On the south side of the building, in southeast corner, was a counter about 6 feet long; it butted up against the wall and projected over on the window 6 or 8 inches. The light in the house was bright. When Stevenson came in he asked who it was that called his name. I told him Smith and Roberson. He asked where Roberson was. I said he had not come back. Deft. said Roberson had not treated him right. Stevenson then invited the boys up to take a drink of cider. Stevenson held a gun in his right hand about the
41 guard. I was putting down some glasses on the counter; Stevenson at this time was close to the counter in a position that he could see the front door and south window. The next thing I saw was a flash from a gun or pistol coming from the door. Stevenson made a motion as to reload a Winchester (that was the kind of gun he had). Stevenson did not fire after I saw the fire and smoke coming from the door. If Stevenson fired at all it must have been about the time the fire and smoke came from the door. I saw after the shooting a bullet hole in the counter opposite where Stevenson stood, about one foot from far end of counter and 5 feet from the door. When I saw Stevenson make the

move with his gun, he advanced a step and said, come on; I am ready for you. Stevenson did not remain in the building more than five seconds; then went out the back way. I think Stevenson could have seen a party through this south window approaching the door from the south. We afterwards tested the matter by having a party walk on the sidewalk by the south window; of course we knew who was doing the walking and we knew him. I think I could have recognized any man I was familiar with if he was not going fast; if he was in a run I could not recognize him. The defendant was nervous and excited while in my house. At the time of the shooting there was no barrel on the counter next to the window. I had moved the same before that.

W. T. HARRIS.

I was acquainted with deft. Was introduced to deceased the evening he was killed. I saw the shooting at Bandy's cider joint; heard
42 a conversation between Davidson and defendant at the drug store. Deft. told Davidson that he would take a son of a bitch that could not schedule a horse instead of him; he gave him a right smart of a cursing. He talked like he was mad. Stevenson left the drug store, and the next thing I saw Gaines had him under arrest. Heard Gaines say, "Throw it down or I will kill you." They then started toward the hotel. I afterward saw the defendant and his wife coming back from the direction of the hotel from the south; heard Stevenson say he would go home and get his gun and kill the damned son of a bitch; heard him repeat this I suppose half a dozen times. I suppose 15 minutes after I saw deft. and his wife going from the hotel; I heard two shots, and following that was a voice saying, "Hide out; Stevenson is in town." I saw the flash of this gun. He walked right *right* up to Bandy's place and called for cider and wanted everybody to come up and drink; he made a general invitation. The defendant seemed to be excited and mad. He had his gun in several positions; just before the killing had it in his right hand. I was standing leaning against the door, facing on the south side of the door. I had not been there but a little while till Mr. Gaines came up. I don't know where he came from. He shot him nearly right in my rear. The deft. threw his gun right across his arm and fired; if there was two shots it all sounded as one. Just as I turned, Gaines turned and ran quartering out in the street and fell. Dr. Berry & E. D. Sneed were standing at the north side of the door. Did not hear Gaines speak either before or after he was shot. Stevenson was standing so that he could have seen out of the front door &
43 through the south window if he had wanted to. Heard no words said either by deceased or defendant at the time of the shooting. The defendant was drinking at the time. Examined Gaines' pistol; there was one empty shell; looked like it had been freshly fired. When deft. walked into the house where killing occurred he was holding the gun with his finger on the trigger & his thumb on the hammer & he held same in this position nearly all the time.

Mrs. R. C. ROBERSON.

I saw Mr. Stevenson & Mr. Gaines the night Gaines was killed; heard a conversation between them. They were out in the street back of the drug store. I was upstairs in back window. What first attracted

my attention was loud talking; one of them was Stevenson. I heard Gaines tell Mr. Stevenson to put up his knife; that he must behave himself and put up his knife. Stevenson said he would not do it. Gaines said he was an officer, and he must put up his knife and behave himself. Still he refused to do that, and told him to draw his gun and he would cut his heart out. Gaines told him he did not want to have any trouble with him, and says, "I am a friend to you and you must put up your knife and behave yourself." By this time my husband come up and asked Stevenson to put up his knife. Stevenson then stepped off and Gaines threw his gun on him and told him 3 times to throw down his knife. Stevenson told him he was the first man who ever drew a gun on him. Gaines said "I would not have done it if you had not drawn your knife." Heard defendant ask Smith for his six-shooter. Smith said he did not have any. Deft. said he would go home and get his Winchester and come back and kill the son of a bitch. 30 minutes later I heard 2 shots and a voice say, "Hide out; Stevenson is in town." I saw Gaines as he went to Bandy's cider joint; as he got in the light of the door I saw the flash of the gun and heard the report, & it seemed to come out of the house. I had heard no report of a gun up to the time I saw the flash & heard the report of the gun come out of the house. If there was more than one shot it seemed to me as one.

Mrs. Joe Paul.

I heard John Stevenson say at the Central Hotel, in August, 1893, he was getting tired of being pulled around by deputy marshal's; he was going to kill the next one that arrested him.

C. S. Hamm.

Heard the deft. say in about 30 minutes after the shooting that this was the third son of a bitch he had shot or killed. No one asked him or requested him to make the above statement as I heard, & I heard all that was said.

E. H. Scrivener.

After the killing of Joe Gaines I had the defendant in charge; heard him say that he killed Gaines; that he would do it again under the same circumstances; that all he hated about it was that he did not kill that other son of a bitch, Bluff Davidson. He said he would kill him again under same circumstances. I have contributed money for the prosecution of this case. The above statement was voluntarily made by the deft. This was while I was working as an officer for the Ardmore court. We had an organizatiom up there for the protection of deputy marshals. When one was killed we all contributed to the prosecution, & if one killed a man while attempting to arrest him we all contributed to his defense.

J. E. Martin.

Heard defendant say the next day after he had killed Gaines that he killed him; that he did not care any more for killing him than if he was a damned snake. He said it time and time again that day. I have contributed money to this prosecution. The statement was voluntarily made by deft., & there was a great many present. We officers had an associa-

tion by which it was our duty to assist in burying any of the officers killed, & when the officers we help him, & if anyone killed, we assist with money to employ atty.'s to assist in the prosecution.

Mrs. AUTEN.

Heard the defendant say the night of the killing and soon after he had killed Gaines that he was not sorry for killing him; that he did not think any more about killing him than he would a squirrel. I had asked him if he was not sorry for killing Gaines, and this answer was in reply to my question. I was not subpœnaed in this case, but came here
46 by telegram from Mr. Williams; arrived at 4 o'clock this evening, & was subpœnaed after I got here.

JOHN BLACK.

Know the defendant; had spoken only once or twice to deceased; had no personal acquaintance with him; was in Pauls Valley the day Gaines was killed. I saw the defendant that night at the Underwood drug store. We left that place together. As we were walking away in the direction of Stevenson's house Gaines came walking up behind us and touched Stevenson on the shoulder and told him that he wanted him; says the fuss has got to be stopped; says we are going to quiet this town; it is too rowdy. Deft. says, I have done nothing except curse Bluff Davidson. Gaines says, well, it has got to be stopped, and about that time he noticed Stevenson have his knife he had in the drug store. Gaines told him to put it in his pocket. Stevenson said it was his knife and that he had not drawn it on him and would not put it up. At the time Gaines came up to us and tapped Stevenson on the shoulder we were talking about a pasture. I was working for a big cow man that had a pasture leased from Stevenson, and we were talking about that. It was a quiet, peaceful conversation about business matters. Gaines had one hand on his six-shooter when he came up.

R. A. SMITH.

I was in Pauls Valley the night of the shooting. I saw the deceased at the Underwood drug store about half hour before the killing. He said I thought I would stay here a few minutes and maybe
47 Stevenson will come back. Says I ought to have killed the son of bitch when he was here while ago, and if he comes back I am going to kill him. I was at Bandy's saloon; saw the deceased as he approached; saw one shot fired. He came, not in a run, but in a kind of a trot with his pistol in both hands. As he approached the door in a trot he threw his pistol in and fired. He said nothing. Did not see where defendant was standing at the time of the shooting; he had ordered cider just a moment before. I heard two shots close together; the first shot came from the pistol; after that another shot from the inside. I heard two shots, & they were so close together that I could hardly distinguish between them. The first shot I saw came from the pistol.

GEORGE VELANDINGHAM.

Was in Pauls Valley the day Gaines was killed. I was passing in front of the Central Hotel after dark; heard Gaines say that he would go and make the son of a bitch hard to catch. A young man was with me; I think was Jim Leftwick. The statement Gaines made was that he had

tried to get deft. to behave himself, & he won't do it, & I will go and make the son of a bitch hard to catch. I was on the gallery of the hotel & Gaines in the house at the time this statement was made.

Dr. C. C. BERRY.

Am a practicing physician; live in Pauls Valley; knew deft. and
48 deceased; saw deceased as he approached the cider joint. He was coming very rapidly. As he ran up to the light he had his six-shooter in both hands in shooting position. He ran right up to the door without saying a word, pushed the six-shooter in, and fired. He fired instantly; he did not halt a moment; he did not say a word. Immediately after this I heard a report from the inside of the house. The two shots were far enough apart that I could distinguish between them. Gaines fired the first shot. I think the wound in Gaines' arm was made when he had the pistol in both hands; don't see how it could have been done otherwise.

Captain E. D. SNEED.

Live in Pauls Valley. I saw Gaines as he approached Bandy's cider joint from the south. He was going in a pretty good gait, holding his pistol in both hands (shooting position). He ran right up to the door, poked his pistol in, and fired instantly; he said nothing. After he shot I heard a report from the inside. Gaines fired the first shot. I am certain of that. There was a half barrel of cider that sat on the counter that would obstruct the view of south window. I don't think it was possible for a man in the inside of the house to have seen Gaines as he passed the window. Did not hear the deft. say anything; he had just ordered cider and was preparing to drink. Gaines did not say a word, but fired instantly on approaching the door; after that a fire came from the inside. The ball from Gaines' pistol imbedded in the counter, missing Stevenson five or six inches. I also heard the two shots fired by
deft. before he reached the saloon. He was about 20 steps from
49 me & heard him saying something in a loud tone of voice, but don't remember what he said.

C. B. LADD, in rebuttal.

After Stevenson and his wife left the Central Hotel Gaines did not leave the hotel till he went to the place of the killing. Did not see Velandingham that day or night.

BLUFF DAVIDSON, in rebuttal.

After Mr. Gaines had released Stevenson at the hotel to go home with his wife I did not hear Gaines say I will go and make the son of a bitch hard to catch.

The foregoing bills of exception are allowed and ordered filed in connection with the following explanations and qualifications:

1st. The testimony of Mrs. Joe Paul, as stated in bill of exceptions No. 1, was admitted to the jury for the purpose of showing the animosity and bad feeling of the defendant toward deputy marshals as a class. This statement was made at the time and the jury instructed that it was admitted for that purpose only.

As to the second bills of exceptions, it is not believed that any error was committed in permitting the oral proof as to the official position held by the witness B. D. Davidson and the deceased, Joe Gaines.

50 As to the third bill of exception, the testimony shows that the statements made by the defendant to the witnesses Hamm, Scrivner, and Mrs. Auten were made voluntarily and in the course of conversation had between the witnesses and the defendant, and that neither force, threats, nor any attempt was made to draw from him the expressions used by the defendant.

As to the fourth exception, no objection was raised and no exception taken upon the trial of the testimony of Mrs. Auten.

As to the fifth exception, the testimony of the witness C. B. Ladd as well as that of the other witnesses present at the time show that the defendant was present and the testimony of Lad's excepted to was not denied.

As to the sixth exception, the witness Lindsay was a U. S. deputy marshal and an officer of the court, and the court in the exercise of its discretion, after the Government announced its intention not to use said Lindsay as a witness, refused to permit him to be placed under the rule by the defense, because it was apparent to the mind of the court that the only reason such request was made by the defense was to keep said Lindsay out of the court room and place him in such a position that the district attorney could not have the privilege of consulting with him as to the witnesses in the case, most of whom were well known to said Lindsay.

As to the exceptions No. 9 and No. 8, the charges were not

51 given because the court conceived that the subject-matter stated in the charges asked was fully covered by the general charge of the court.

D. E. BRYANT, *Judge.*

(Endorsed:) 535. The United States vs. John Stevenson. Bill of exceptions & state facts. Filed June 28, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THE UNITED STATES *vs.* JOHN STEVENSON. } No. 535.

To the Hon. D. E. BRYANT,
U. S. Judge for the Eastern District of Texas:

Your petitioner, John Stevenson, the defendant in the above numbered and styled cause, respectfully represents and alleges that in the trial of the above cause, which was tried on April 20, 1895, the defendant was convicted of murder and was on the 21 day of June, 1895, sentenced to be hanged.

And defendant represents and shows that in the trial, the records and proceedings of the circuit court of the United States for the eastern district of Texas, at Paris, Texas, in the above-styled cause, as well as the

52 trial and the final judgment therein, there are many manifest errors, wherefore your petitioner prays that a writ of error issue for the

removal of said cause to the Supreme Court of the United States for review and revision, and that said judgment be reversed.

FAGAN & BRENTS,
Attys. for Deft.

Allowed June 28, 1895.

D. E. BRYANT,
Judge presiding at said trial.

(Endorsed:) No. 535. The United States vs. John Stevenson. Defendant's petition for writ of error. Filed June 28, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

Assignments of errors.

In the circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas.

THE UNITED STATES
vs. } No. 535.
JOHN STEVENSON.

Now on this the day of June, 1895, and within sixty days from the entry of the judgment in this cause, comes John Stevenson, the defendant in the above entitled and numbered cause, and files this his assignment of errors, and says that on the trial of said cause in the trial court there were numerous errors committed, to the great injury
53 of the defendant, which errors were duly complained of by this defendant, and which are manifest in the record of this cause, in this, to wit:

1st. The court erred in failing and refusing to submit to the jury a charge upon manslaughter, the evidence clearly raising that issue and necessitating a charge thereon.

2nd. The court erred in not defining to the jury in a proper charge the law of cooling time.

3rd. The court erred in excusing the juror T. J. Simpson from the jury on account of the sickness of said juror on the second day of the trial of said cause, when said juror had been accepted by the defendant and the trial had proceeded one entire day and to the conclusion of the Government's testimony, said defendant in person not agreeing to such action of the court, the agreement of E. W. Fagan, one of defendant's counsel, to excuse said juror not being binding upon the defendant in a capital case.

4th. The court erred in permitting the witness Mrs. Joe Paul to testify over the objections of the defendant that "in May, 1893," before the homicide on the 22 day of August, "that she was at the National Hotel in Pauls Valley and heard the defendant say that he (defendant) intended to kill the next damned marshal that arrested him, that he was tired being pulled around by them," when there was no evidence to show that at that time the defendant knew deceased or that at that time he was a deputy marshal; nor was there any evidence showing that the defendant had ever been arrested or pulled around before this time, or knew that Joe Gaines was a deputy marshal.

54 5th. The court erred in permitting oral testimony tending to establish the official positions of B. D. Davidson and Joe Gaines.

6th. The court erred in permitting the Government witness' Ham, Scrivner, and Mrs. Auten to testify as to statements alleged to have been made by the defendant after the shooting, it being shown from the testimony that at the time the statements were made (if made at all) the defendant was under arrest and was not warned as to said statements, or the same clearly proven to have been voluntarily made.

7th. The court erred in permitting the witness Mrs. Auten to testify on the trial of this cause in behalf of the Government, said witness never having been subpœnaed in said cause or her name endorsed upon the back of the indictment, or any notice whatever served upon the defendant or his counsel that she was to be used as a witness in said cause.

8th. The court erred in refusing to give the special charges 1 and 2, as requested by the defendant.

9th. The court erred in refusing to require the Government witness H. H. Lindsay placed under the rule with the other witnesses, the defendant having requested that he be sworn and placed under the rule as a witness for him.

10th. The court erred in permitting the Government witness C. B. Ladd to testify over the objections of the defendant that he heard the Government witness W. L. Roberson say to the defendant, "Throw
55 down your knife or Gaines will kill you, and that defendant threw the knife down," said testimony being hearsay testimony and the witness Roberson being present in court.

11th. The court erred in the last clause of its charge to the jury, as follows: "It is simply a conscientious conviction with you as representatives of the law and representatives of right. If the evidence generates full conviction, you have no right to shirk your duty; if it generates full conviction that he is guilty, then you should convict him," said charge failing to instruct the jury that unless it does generate full conviction, they should acquit the defendant, and was calculated to impress the jury with the idea that the court entertained as to the kind of verdict to be reached.

12th. The court erred in overruling the first ground in defendant's amended motion for a new trial, which is as follows, to wit: Because the verdict of the jury is not supported by the evidence, and taken as a whole is not sufficient to convict this defendant of murder.

13th. That this defendant has not been convicted by due process of law, and has not had a fair and an impartial trial, and has not been convicted upon sufficient legal testimony, but by an unprecedented oppression and steel-ribbed prosecution of the deputy marshal/ force of this court; that the deputy marshal/s, Martin, Scrivner, and Lindsay, each and all, not only contributed their money to convict this defendant, but Lindsay wagered the sum of $120.00 that this defendant would be convicted, and the witness Scrivner held the money awaiting the verdict in this
56 cause, as is fully set out in deft's. 12th assignment in his amended motion for a new trial in this cause.

14th. The court erred in overruling the 13th assignment set forth in defendant's motion for a new trial, alle/ging as follows, to wit: That defendant has not had a fair and impartial trial on account of the sickness of E. W. Fagan, his leading counsel in this cause.

15th. The court erred in overruling the 16th assignment set forth in defendant's motion for a new trial, setting forth evidence as to the good reputation of Capt. E. D. Sneed, Dr. Berry, R. A. Smith, and George Velandingham, witnesses for deft. in this cause.

16th. The court erred in overruling the 17th assignment set forth in defendant's motion for a new trial, establishing by various affidavits the bad reputation of the leading Government witness, C. B. Ladd.

17th. The court erred in overruling the 18th assignment set forth in defendant's amended motion for a new trial, setting forth newly discovered evidence of three witnesses, to wit, Irish Dan, William Shaw, and James Leftrick, all of whom would state that they heard deceased say he was going to kill the defendant that night, and that he went to the scene of the homicide for that purpose.

18th. The court erred in overruling the defendant's amended motion for a new trial in this cause, all of which errors operated to the prejudice and injury of this defendant; wherefore the said John Stevenson
57 prays that the said judgment of the circuit court for the eastern district of Texas, adjudging him guilty of murder and sentencing him to be executed, be reversed.

FAGAN & BRENTS,
Attys. for the Defendant, John Stevenson.

(Endorsed:) No. 535. The United States vs. John Stevenson. Assignment of errors. Filed June 28, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THE UNITED STATES
vs. No. 535.
JOHN STEVENSON.

The President of the United States of America to S. Taliaferro, attorney of the United States for the eastern district of Texas, greeting:

You are hereby cited and admonished to be at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, wherein John Stevenson is plaintiff in error and the United States are defendants in error, to show cause, if any there be, why the judgment and sentence rendered against said plaintiff in error, as in the said writ of error mentioned,
58 should not be corrected, and why speedy justice should not be done to the said plaintiff in error in that behalf.

D. E. BRYANT,
U. S. Judge, Eastern Dist. of Texas.

JUNE 28TH, 1895.

Service accepted June 28, 1895.

S. TALIAFERRO,
U. S. Attorney for E. Dist. of Texas.

(Endorsed:) No. 535. The United States vs. John Stevenson. Citation in error. Filed June 28, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

59 I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, hereby certify that the foregoing 58 pages of transcript contain a full, true, and correct copy of the record and of the assignment of errors, and of all the proceedings in cause No. 535 on the criminal docket of said court at Paris, Texas, entitled, "The United States vs. John Stevenson," as the same now appear of record and on file in my office at Paris, Texas.

To certify which, witness my hand and the seal of said court at office in Paris, Texas, this 24 day of July, 1895.

[SEAL.] C. DART, *Clerk*,
By MEL KIRKPATRICK, *Deputy*.

60 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States, plaintiff, vs. John Stevenson, defendant, a manifest error hath happened, to the great damage of the said John Stevenson, defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, D. C., together with this writ, so that you have the same at Washington, D. C., within 30 days from the date hereof, in the said Supreme Court, to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28 day of June, in the year of our Lord one thousand eight hundred and ninety-five.

C. DART,
Clerk of the U. S. Circuit Court, Eastern District of Texas,
By H. H. KIRKPATRICK, *Deputy*.

Allowed June 28, 1895.

By D. E. BRYANT,
Trial Judge.

61 I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, hereby certify that I received this writ on the 28 day of June, 1895, and that on this 24th day of July, 1895, I have transmitted to the clerk of the United States Supreme Court at Washington, D. C., a true copy of the record and proceedings in the within-named cause, duly certified under my hand and seal.

Witness my hand and the seal of said court at my office in the city of Paris the day and date last above named.

[SEAL.] C. DART, *Clerk*,
By MEL KIRKPATRICK, *Deputy*.

(Indorsement:) No. 535. ——— docket. United States circuit court, eastern district of Texas, at Paris. John Stevenson vs. The United States. Writ of error. Filed June 28, 1895. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

62 Before the undersigned authority this day personally appeared John Stevenson, who, being duly sworn, deposes and says that at the last regular term of the circuit court of the United States for the eastern district of Texas, at Paris, Texas, he was tried an deonvicted of the crime of murder and sentenced to death; that he was granted a writ of error, removing said cause to the Supreme Court of the United States for revision and review; that the clerk of said circuit court has caused the transcript of the record in said cause to be filed in the said Supreme Court; that affiant (the plaintiff in error) is actually too poor and has not the means sufficient to pay for the printing of the record in said Supreme Court, as required by rule 10 of the rules of the said Supreme Court.

JOHN STEVENSON.

Subscribed and sworn to before me this 4th day of November, 1895.
JNO. C. EASTON,
U. S. Commissioner.

63 (Indorsement:) Case No. 15971. Supreme Court U. S. October term, 1895. Term No. 681. John Stevenson, plaintiff in error, vs. The United States. Affidavit by plaintiff in error that he is too poor to pay for printing record. Filed Nov. 8, 1895.

(Indorsement on cover:) Murder case. Case No. 15971. Term No., 681. John Stevenson, plaintiff in error, vs. The United States. E. Texas, C. C. U. S. Filed July 29, 1895. Supreme Court U. S., clerk's office. Received July 29, 1895.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 681.

JOHN STEVENSON, PLAINTIFF IN ERROR, v. THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

STIPULATION.

In this cause it is stipulated as follows:

First. It is claimed in behalf of the United States that the words "because the evidence clearly raised that issue that demanded a charge thereon," which appear on page 14 of the printed record, were improperly inserted in the bill of exceptions as made up in the lower court, and after the same was signed by the trial judge.

Second. Motion suggesting diminution of the record and asking for a certiorari to correct the record is hereby made, and notice thereof is waived.

Third. Actual issuance of the certiorari is waived, it appearing that the trial judge, the Honorable David E. Bryan, has sent up a certificate, hereto attached and made part hereof, to the effect that the said words were not in the bill of exceptions when signed by him, and that they were inserted after he signed the bill of exceptions, and without his knowledge and consent.

Fourth. Said certificate is made a part of the record in this court, and the record as sent up will stand corrected so as to conform thereto.

Fifth. This stipulation and said certificate shall be printed and attached to the record already printed.

Washington, D. C., February 3, 1896.

FRED. BEALL,
Of Counsel for John Stevenson, Plaintiff in Error.
J. M. DICKINSON,
Assistant Attorney-General.

JOHN STEVENSON
v.
UNITED STATES.

I, David E. Bryant, judge of the district court of the United States of America for the eastern district of Texas, do hereby certify that exception No. 7, in the original bill of exception signed and allowed by me in the above-entitled cause, read at the time it was signed and allowed by me as follows:

"Be it further remembered that the defendant, through his counsel, requested the court to submit to the jury a charge upon manslaughter; but the court refused to submit that issue to the jury, to which action of the court, in failing and refusing to submit to the jury such charge, the defendant at the time excepted."

I further certify that the words "because the evidence clearly raised that issue that demanded a charge thereon," which appear in the record as filed in the Supreme Court, were not in the bill of exceptions when signed by me and were erroneously inserted, without my knowledge or consent, and should be stricken out, in order that the record in the Supreme Court shall conform to the bill of exception as signed and allowed.

Sherman, Tex., January 22, 1896.

D. E. BRYANT,
Judge of the District Court, Eastern District of Texas.

(Indorsed:) Case No. 15971. Supreme Court U. S. October term, 1895. Term No., 681. John Stevenson, plaintiff in error, v. The United States. Stipulation and addition to record. Filed February 3, 1896.

Office Supreme Court U. S.
FILED.
OCT 12 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN STEVENSON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 681.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN STEVENSON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 681.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the circuit court of the United States for the eastern district of Texas for having murdered one Joe Gaines, a United States deputy marshal, on August 22, 1893, in Pickens County, Choctaw Nation, Ind. T. He was found guilty on April 20, 1895, and on June 21, 1895, sentenced to be hanged. Both the plaintiff in error and the deceased were white persons and not Indians.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing during the term.

Notice of this motion has been served on the plaintiff in error and upon his counsel in the court below and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

4873

Office Supreme Court U. S.
FILED.
DEC 30 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1895.

No. 681.

JOHN STEVENSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR, BY FRED BEALL.

WASHINGTON, D. C.:
HAYWORTH PUB. HOUSE,
1895.

Supreme Court of the United States.

October Term, 1895.

No. 681.

JOHN STEVENSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR, BY FRED BEALL.

STATEMENT.

This is a murder case, growing out of an unfortunate tragedy that occurred August 22, 1893, at Pauls Valley, Chickasaw Nation, Indian Territory, wherein one Joe Gaines was shot and killed by the Plaintiff in Error, John Stevenson.

It is alleged in the indictment that the participants were both white persons, and not Indians, nor citizens of the Indian Territory. Record, p. 2.

The proof shows that Stevenson is a white man and a "non-citizen of Territory". Record, p. 15.

One Bluff Davidson, a U. S. Commissioner for that part of the Chickasaw Nation, at the time of the tragedy was at Pauls Valley holding court, as we infer a court somewhat like a Justice of the Peace court, as provided for in section 39, pages 98 and 99 of 26 U. S. Stats. and the deceased was acting as a constable, and deputy marshal for said court.

The Commissioner's court having been adjourned for the day, we find him in a common drinking saloon, known as a "cider joint," where he could scarcely expect to command the respect that might have been accorded him in a place where the dignity of his position was more creditably emphasized. In this place there occured some unpleasantness between the Commissioner and the Plaintiff in Error, occasioned by the consideration of the sufficiency of a bail-bond, the latter being one of the sureties offered. Later on, about 9 o'clock p. m., at a hotel the matter seems to have been revived, and the Plaintiff in Error having doubtless had his excitement reinforced from repeated visits to the "cider joint" and smarting under what he esteemed an injury to his friend and an insult to himself, used language according to the the testimony of the Commissioner himself, which "no honorable man deserves and no brave man would wear." That little episode however, seemed to have lived its time out and to have ended as all mortal things must, and the whole affair appears to have been dismissed from the mind of Stevenson. The next position in which we find him is in a drug store amidst new scenes and surroundings—quietly whittling with his knife, we suppose from the simple mention of the knife, dissociated from any improper use thereof. At this drug store he met his

friend John Black, and the two shortly afterwards left the drug store together in the direction of Stevenson's house, quietly discussing a business matter of mutual interest to them, when, as testified to, by Black, "Gaines came walking up behind us, and touched Stevenson on the shoulder, and told him that he wanted him; says the, fuss has got to be stopped; says we are going to quiet this town—it is too rowdy. Defendant says, "I have done nothing but curse Bluff Davidson." Gaines says, "well it has got to be stopped," and about that time he noticed Stevenson have his knife he had in the drug store, Gaines told him to put it in his pocket; Stevenson said it was his knife and that he had not drawn it on him, and he would not put it up."

Record, p. 22.

W. L. Roberson, a witness for the government, testified. "The first I saw of Gaines and the defendant that day or evening after the difficulty (i. e. the difficulty with Bluff Davidson) was about 9 o'clock, after dark. They were standing on the side walk back of D. C. Underwood's drug store. When I first heard Stevenson speak he said: "Don't draw that pistol, if you do, I will cut you." They were standing on the side walk then. I walked in the middle of the street, and said "John put up your knife and go home and behave yourself." They walked then over to where I was, Stevenson holding with his left hand to Gaines' right arm" (evidently to keep Gaines from shooting him) "Stevenson was holding a knife in his right hand. After they came over to where I was Stevenson turned the officer loose, and as soon as he turned loose of Mr. Gaines and *started off, Gaines drew his pistol on him and told Stevenson to drop his knife* or *he would kill him.* I said "John for God's sake throw your knife down or he will kill you. He dropped his knife."

Record, p. 18. After some words, the parties separated, Gaines remaining about the drug store, and was heard to say, "I thought I would stay here a few minutes and maybe Stevenson will come back. I ought to have killed the son of a bitch when he was here a while ago, and if he comes back I am going to kill him." Stevenson went off and armed himself with a Winchester rifle and returned to the saloon, when near the saloon, he fired off his gun twice, proclaiming in a loud voice, "Hide out, Stevenson is in town!" Thereupon Gaines gathered his pistols and started towards the saloon declaring "that he would make the son of a bitch hard to catch," he went in a trot or run to the saloon, holding his pistol in a shooting position Stevenson had gotten into the saloon and had ordered drinks for the crowd, the bartender had just set the glasses down on the counter, and was in the act of serving Stevenson and his friends; Stevenson, greatly excited, with his mind inflamed by the combined influence of intoxicants and the bullying, domineering treatment of the deputy marshal, stood at the counter, nervously shifting his gun from one position to another, appreciating, no doubt, fully all his rights as an American citizen, and especially the right to have and bear arms, to walk the public streets, and to visit all public places, and yet in view of the attack just before made on him by Gaines, fearing a renewal thereof. As he stood at the bar, intensely watchful for the approach of Gaines, he suddenly saw a pistol thrust into the door, instantaneously followed by the flash and the report from the deadly weapon, as in a twinkling, quickly impelled by a sense of self-preservation he let fall the unerring rifle, and before Gaines could fire the second shot with his pistol still drawn, Stevenson sent a bullet crashing through his antagonist's arm extending the deadly pis-

tol, and on through the body, carrying death to the would-be slayer.

December 1, 1893, the Grand Jury presented in open court in the United States Circuit Court of the Eastern District of Texas, an indictment against the Plaintiff in Error charging him with the murder of Joe Gaines.

The record recites that a "*quorum*" of the Grand Jury was present when the bill of indictment was presented.

April 16, 1895, the trial of the cause began, a jury was duly empaneled, but afterwards, it was discovered that one of the jurors was disqualified; that jury was therefore discharged and another immediately empaneled.

The record shows the following order made on April 17th, 1895.

"THE UNITED STATES
vs. } 535.
JOHN STEVENSON.

The venire of petit jurors having been exhausted by challenge it was ordered that the marshal summon thirty talesmen to complete the jury for trial of this cause, and thereupon J. E. Bobo was duly called, examined tried, empaneled and sworn as a juror to try this cause."

It does not appear that the defendant was present when that order was made.

The record also shows the following order:

"April 20, A. D., 1895.

"It is therefore considered by the Court that the defendant, John Stevenson, is guilty of murder in the Indian Territory as charged in the Indictment and found by the jury, and it is ordered that he be remanded to the custody of the marshal and be by him committed

to the jail of Lamar County to await the judgment and sentence of the court."

It does not appear certainly that the defendant was present in court when that order was made.

After his conviction, the defendant entered through his attorneys a motion for a new trial, which was filed June 18, 1895, following which we find this order in the record:

"Wednesday, June 19, 1895.

"Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, judge.

* * * * * * *

"THE UNITED STATES } vs. } 535.
JOHN STEVENSON. }

"This day came on to be heard defendant's motion for a new trial herein; the same being duly argued by counsel, was submitted to the Court and taken under advisement and action deferred."

At this very important point of the proceedings, there is nothing in the record to indicate that the defendant was present, or indeed, who was present except the Judge.

The next order found in the record is as follows:

"Friday, June 21, 1895.

"Court met pursuant to adjournment.

"Present and presiding, Hon. D. E. Bryant, Judge.

"THE UNITED STATES } vs. } 535.
JOHN STEVENSON. }

On this day came defendant's motion for a new trial herein, the *court having formerly heard the evidence* and argument of counsel herein, and the court being fully advised in the premises, as it is the opinion of the court that the law and the facts are against the defend-

ant, and the motion is overruled, and a new trial denied the defendant whereupon in open court defendant excepts."

Again it does not appear that the defendant was present in his own proper person, the exception taken to the action of the court, in overruling the motion for a new trial might have been by his attorneys.

A general bill of exceptions was presented to the court during the term at which the cause was tried, and was by the presiding Judge allowed and ordered filed, which was accordingly done June 28, 1895.

The bill of exceptions sets out the substance of all the testimony introduced upon the part of the Government, and the exceptions taken by the defendant during the progress of the trial.

As stated above, the deceased was a Deputy U. S. Marshal; on the trial two U. S. Deputy Marshals were introduced as witnesses against the defendant; one, E. H. Scrivener testified as follows: "We had an organization up there for the protection of deputy marshals. *When one was killed we all contributed to the prosecution, and if one killed a man while attempting to arrest him we all contributed to his defense.*"

The other, J. E. Martin, testified as follows: "We officers had an organization by which it was *our duty* to assist in burying any of the officers killed, and when the officers [kill anyone] we help him, and if anyone [is] killed we assist with money to employ attorneys to assist in the prosecution."

From the conviction and judgement of sentence the defendant has appealed to this court, assigning specifically 18 errors, some arising on the introduction of the testimony, and others upon the instructions of the court to the jury.

I do not deem it necessary to discuss all the assign-

ments of error, but shall confine myself to two, either of which is, I submit, sufficient to justify a reversal of the case.

ARGUMENT.

The first assignment of error is:

"The Court erred in failing and refusing to submit to the jury a charge upon manslaughter, the evidence clearly raising that issue and necessitating a charge thereon."

That assignment is based upon exception No. 7, which is as follows:

"Be it further remembered that the defendant, through his counsel, requested, the court to submit to the jury a charge upon manslaughter, *but the court refused to submit that issue to the jury*, to which action of the court, in failing and refusing to submit to the jury such charge, the defendant at the time, excepted, because the evidence clearly raised that issue, that demanded a charge thereon."

The learned judge refused to submit to the jury the issue of manslaughter, though specially requested to do so.

If there was no evidence before the jury which tended to show that the offense committed was manslaughter, I concede that the court was right in refusing to submit that issue to the jury, but if there was anything whatever in the evidence tending to show an offense which did not rise above that of manslaughter, then it was error not to submit the issue of manslaughter to the jury. The jury are the sole judges of the testimony, and of the weight to be given thereto, and the court cannot without entrenching upon the peculiar functions of the jury instruct them as to the weight

which shall be given to the testimony. If there was any testimony, however slight, or however incredible that to any extent tended to establish that the plaintiff in error was guilty of manslaughter, and the court refused to submit that issue to the jury, then the court assumed to weigh the testimony, and to judge of its sufficiency, a duty not only not develoved on him by the law, but it was the exercise of a power wholly unwarranted by the law.

If a court having heard all the testimony in a criminal case, is of the opinion that if a verdict of guilty was found he would be compelled to set it aside, he may direct the jury to return a verdict of not guilty; but the converse of that proposition is not true; the court may be entirely satisfied from the testimony, that a defendant on trial for some offense is guilty, and deserves conviction, to be followed by the severest punishment, yet he cannot say, hint or insinuate that the jury should convict; upon the contrary he is enjoined to the very greatest circumspection in his instructions to the jury that he do not express any opinion, whatever, as to the weight which the jury should give to the testimony.

While it is true that instructions are not required to be given upon an inferior degree of crime necessarily included in the charge, if there is no evidence which warrants it, yet it is otherwise, if by any possible legitimate construction of the evidence the jury might convict of a lower degree.

Jones *v.* State, 29 Tex. App. 388. 5 S. W. 403.

In the case of Beard v. United States 158 U. S. 550, after stating the facts as accounted by the accused and his witnesses, the court on page 554 said:

"The account we have given of the difficulty is not in harmony, in every particular, with the testimony of some of the witnesses, but it is sustained by what the

accused and others testified to at the trial; so that, if the jury had found the facts to be as we have detailed them, it could not have been said that their finding was contrary to the evidence. *At any rate, it was the duty of the court to tell the jury by what principles of law they should be guided, in the event they found the facts to be as stated by the accused.*"

"In all criminal causes, the defendant may be found guilty of any offense the commission of which, is necessarily included in that which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, *Provided*, that such attempt be itself, a separate offense." Sec. 1035 Rev. Stats.

In the case of Sparf and Hansen vs. United States 156 U. S. 51, on page 63 Justice Harlan speaking for the majority of the Court said:

"Upon a *careful scrutiny of the evidence*, we *can not find any ground whatever*, upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offense included in the one charged, or of a mere attempt to commit the offense charged. A verdict of guilty of an offense less than the one charged, would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an *entire absence* of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault."

And again on page 99 he said:

"Briefly stated the contention of the accused is that *although there may not have been any evidence whatever* to support a verdict of guilty of an offense less than the one charged—and such was the case here—yet, to charge the jury, as matter of law, that the evidence in the case did not authorize any verdict except one of guilty or one of not guilty of the particular offense charged, was an

interference with their legitimate functions, and, therefore, with the constitutional right of the accused to be tried by a jury.

The error in the argument, on behalf of the accused, is in making the general rule as to the respective functions of court and jury, applicable equally to a case in which there is some substantial evidence to support the particular right asserted, and a case in which there is *an entire absence of evidence* to establish such right. In the former class of cases the court may not, without impairing the constitutional right of trial by jury, do what, in the latter cases, it may often do without at all entrenching upon the constitutional functions of the jury. The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But if there are *no facts in evidence* bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state of case.

That case was affirmed because the court "upon a careful scrutiny of the evidence" could not find *any ground whatever* upon which the jury could properly have reached "a verdict of guilty of manslaughter." "There *was an entire absence* of evidence upon which to rest a verdict of guilty of manslaughter." In that case this court found there were "*no facts in evidence* bearing upon the issue of manslaughter."

Had there been any testimony tending to prove the issue of manslaughter, the court no doubt would have reversed the case.

The overwhelming weight of authority is that the trial court is required to instruct the jury on every issue raised by the pleading in a criminal cause, upon which there is any testimony, however slight it may be.

In State *vs.* Crabtree 20 S. W. R. 7 (Mo.) the defendant was convicted of murder on evidence showing that he shot the deceased while the two were in a scuffle. The State's evidence was that he shot the deceased in the back, without provocation. The defendant's testimony *tended* to proved that he shot in self-defense. *Held* that it was reversible error to fail to instruct the jury in regard to manslaughter.

If there is any evidence tending, though slightly to establish a defense, the defendant is entitled to a charge directly upon that point, no matter what view the court may entertain of the weight and value of his testimony. McDaniel *vs.* State, 24 Tex. App. 552, 7 S. W. 249; Smith *vs.* State 24, Tex. App. 290, 6 S. W. 40; Honesty *vs.* Com. 81 Va. 283.

The charge of the jury must make a pertinent application of the law covering every theory arising out of the evidence. Liskosski *vs.* State 23 Tex App. 165, 3 S. W. 696; Roberts *vs.* State 23 Tex. App. 170, 4 S. W. 879; Bond *vs.* State 23, Tex. App. 180, 4 S. W. 580.

It is the duty of the court to declare the law applicable to every crime or grade of crime of which, under the evidence accused may be convicted. Authorities cited in State *vs.* Brooks 10 West, 692, Mo. 542, 5 S, W. 257; Connor *vs.* State 23 Tex. App. 385, 5 S. W. 180.

In felony cases, it is the duty of the court whether requested or not, to charge clearly and affirmatively the law applicable to every phase of the case, and especially to every defense presented, and mere negative presentation of an issue is not sufficient. Williams *vs.* State 24 Tex. App. 342, 6 S. W. 531.

The court must submit to the jury the consideration of every degree of a crime charged, which the evidence

tends to prove. Territory *vs.* Nichols, 3 N. M. 76, 2 Pac. 78.

"Where there is even slight evidence that the offense committed may have been of a lower degree than the one charged, it is proper for the trial court to give the jury the law of each inferior offense. State *vs.* Patterson 35 P. 784, 52 Kan. 335.

When an instruction is asked upon a question concerning which there is no direct testimony, yet, if there be any proof tending to establish it, such question should be submitted to the jury as the party asking the instruction is entitled to the benefit of *whatever inference the jury may think proper* to draw from the proof however slight. Peoria Ins. Co. *vs.* Anapow, 45 Ill. 87; Flournoy *vs.* Andrews 5 Mo. 513; Camp *vs.* Phillips 49 Ga. 289; C. & W. I. R. R. Co. *vs.* Bingenheimer 116 Ill. 226.

"The court must charge the law applicable to every phase of the testimony in a criminal case, *without regard to its credibility.* Jones *vs.* State (Tex. Cr. App.) 26 S. W. 1082.

"When there is evidence tending to prove a fact having an important bearing upon the law of the case, though strongly contradicted, an instruction is erroneous which ignores the existence of such fact, and takes its consideration from the jury. Chicago P. & P. Co. *vs.* Tilton 87 Ill. 547.

When the evidence tends to prove a certain state of facts, the party in whose favor it is given has a right to have the jury instructed on the hypothesis of such state of facts, and leave it to the jury to find whether the evidence is sufficient to establish the facts supposed in the instruction. If the instructions are pertinent to any part of the testimony, they should if correct, be given without regard to the amount of evidence to

which they apply. Griel *vs.* Marks 51 Ala. 566; State *vs.* Brown 74 Ill. 232; Jones *vs.* C. & N. W. R. Co. 49 Wis. 352.

It is error to refuse an instruction asked directly applying an essential element of the offense to the case. Floyd *vs.* State, 1 Wash. 336, 15 S. W. 819.

It was said in

State *vs.* Matthews 20 mo. p. 55.

"It was the duty of the court to instruct the jury as to the law of the case. The instructions asked by the counsel for the defendant may have been objectionable in their phraseology, but the court should not therefore, have neglected to give such as the law of thecase required."

On the trial of an indictment it is the duty of the trial judge to charge definitely and specifically *as to every law question involved.* Lang *vs.* State (Tenn.) 1 S. W. 318. 16 Lea 433.

Instructions should correctly state the law applicable the issues and should submit *all questions of fact arising in the case.* Grim vs. Robinson (Neb. 148 N. W. 388.

Where any part of the evidence shows facts which might make the crime only manslaughter it is error to charge the jury that the verdict must be guilty of murder in the second degree, or not guilty thereof. Peoples vs. Hamilton (Mich) 42 N. W. 1131.

Bearing in mind that we must not stop to weigh the eviderce which we may find in the record, let us examine and see if we can find any "even slight" evidence as was said in the State vs. Patterson 52 Kan. 335 Supra, that the offense committed may have been of a lower degree than the one charged."

In making this examination, let us consider all the facts and circumstances disclosed in the record. The proof is that the plaintiff in error is a white man, a free

American citizen, entitled to every right and privilege vouchsafed to every other citizen; he was in his little home town, upon his native heath, where he had a perfect right to have and bear arms, a privilege secured to him by the constitution.

"The right of the people to keep and bear arms shall not be infringed."

Upon which Justice Story said:

"The right of the citizens to keep and bear arms has justly been considered as a palladium of the liberties of the republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally even if these are successful in the first instance, enable the people to resist and triumph over them."

These sacred rights and privileges carried with them corresponding duties and responsibilities. He was required not to infringe upon the rights of others; it was his duty to observe all the laws of the land; but this code is not coextensive with the moral one; there were many things that he could do not violative of the laws of his country, that may be condemned by the code of morals. It is no crime in that country to get drunk or to swear, provided the peace of society is not disturbed.

It is true that the court permitted testimony to go before the jury to the effect that the plaintiff in error had cursed and abused the United States Commissioner, but if that was a violation of the law, as it probably was, there is this mitigating circumstance, the object of his curses showed himself as deserving of abuse, as ever did any man who assumed to represent the peace and dignity of the United States; he confessed himself a hanger on and a lounger around drinking saloons; and his conduct showed him possessed of neither the moral or physical courage to defend himself, or vin-

dicate the law which he had solemnly sworn to maintain.

The little difficulty however, that occurred between the plaintiff in error and "Bluff" Davidson, had fully ended before Gaines appeared on the scene. Stevenson had left Davidson, and gone into a neighboring drug store, and with no designs on any one, and for no improper purpose had taken out his knife, and making some proper use thereof, perhaps whittling a stick, or cleaning his finger nails, he fell in with his friend John Black, and together they started home, going in the direction of Stevenson's house; when all at once Mr. Gaines, the U. S. Deputy Marshal, and friend of "Bluff" Davidson, rushed up behind the two gentlemen and tapping Stevenson on the shoulder, "told him that he wanted him," in other words, arrested him without warrant or authority, for be it observed he was not present at the unpleasantness between Stevenson and "Bluff" Davidson, and if therefore Stevenson had violated the law on that occasion, it was not done in the presence of Gaines and he had no authority under the Arkansas law, then in force, in that part of the Indian Territory, to arrest for an offense not committed in his presence, except upon a warrant duly and legally issued. See Arkansas Statute 1884.

Sec. 591. If any offense cognizable before a justice of the peace *shall be committed in the presence of the constable*, it shall be his duty to arrest the offender and take him before a justice of the peace.

Sec. 592. If it *shall come to the knowledge* of any constable that any such offense has been committed in his township, it shall be the duty of such constable *to present the offender to the justice of the peace of the township in order that he may be arrested and brought to trial as prescribed by law.*

Davidson testified, that "Gaines the deceased, came in and asked me what all this racket or fuss was about? I told him what had happened, he says: "I will go and arrest him." I told him if he arrested him to take him before Scott at Ardmore." No warrant was issued, and without a warrant the arrest was illegal. Not only was there the illegal arrest, but in the exercise of his unbridled tyranny, backed by the U. S. Commissioner, whose fight he had evidently taken up, and relying on the oath bound organization of the Deputy Marshals of that section to defend each other right or wrong, and to unite their efforts and money to prosecute all who might have the manhood to defend themselves against the cruelties of the gang, with a six shooter drawn and presented, he ordered Stevenson to throw down his knife, which he chanced to have in his hand at the time, and no doubt regretted that Stevenson did not make for him a sufficient occasion to kill him, by refusing to yield to his illegal demand. Had Stevenson then and there killed the doughty representative of the peace and dignity of the United States, no one would say he had committed murder. Quietly walking along the streets of his little far western town, disturbing no one, but calmly discussing a business matter with a friend, he was suddenly set upon by Gaines, and a six shooter thrust into his breast, and he ordered to throw down his pocket knife which he chanced to have in his hand. The bully has overpowered and humiliated the man who had the audacity to curse his friend and companion in the mal-administration of the law, and he triumphantly paroles his prisoner, but remains "a few minutes" thinking "maybe Stevenson will come back" and in his exultation is heard to say, "I ought to have killed the son-of-a-bitch when he was here a while ago, and if he comes back I am going to kill him."

It was no doubt impossible for the learned Judge who tried this case below, as it is quite impossible for the members of this court, to fully appreciate that scene in all its import. Upon the one side stood the deputy marshal, with his great long heavy six shooter, leveled upon the object of his wrath, behind him stood the court with jurisdiction to investigate, and power to bail or discharge as he felt disposed and might best subserve the interest of the bully, and behind all was this great clan of Deputy U. S, Marshals, scattered all over the country, bound together by the most solemn obligation—not for the protection of society, nor the vindication of law,—but as Scrivener testified, "When one was killed we all contributed to the prosecution," regardless of the facts or circumstances of the killing, "and if one killed a man we all contributed to his defense."

Stevenson knew of this organization, he was no stranger to the methods of the gang, and when made a victim of their rage, and humiliated as he was at the mouth of the pistol of Gaines, it was but human, that he should feel greatly outraged, and under the influence of liquor, which he seems to have been, it was natural for him to feel defiant, and a disposition to go back on the street, where he had a right to go, and to carry a gun with him for his defense as he had a constitutional right to do.

His blood was hot, he was mad, he was greatly excited, he was writhing under that which he regarded as a great outrage, and indignity; he had not had time for sober reason to return under all the circumstances; his mind could not calmly deliberate, and yet his conduct shows nothing beyond a disposition to assert his rights, and if necessary, defend them.

The firing of two shots as he returned to the street with the wild western whoop "Hide out, Stevenson is

in town;" loud enough to be heard all over the village, was a wholesale warning that could not have contemplated murder, and could only betoken the drunk man, thoroughly wrought up to the highest pitch of unatural excitement.

He did not return either to the hotel where he had left "Bluff" Davidson or to the drug store, where he had left Gaines, but he went straight to the saloon; nor did he speak of or inquire about Gaines when he reached the saloon, but "He asked where Roberson was," and when told he had not come back he said "Roberson had not treated him right" and "then invited the boys up to take a drink."

Gaines having heard the wild whoop of Stevenson, "Hide out, Stevenson is in town," snatched up his pistol and rushed to the saloon, where Stevenson was in the act of treating everyone present, with his pistol in both hands in a shooting position. Which saw the other first, or what preparation by either for shooting after they had seen each other, there is no testimony; it is, however, clearly proven that Gaines came with his pistol in a shooting position, and as soon as he reached the door, thrust it in and fired, missing the plaintiff in error, only a few inches, and immediately after Gaines shot, Stevenson fired the fatal shot, while Gaines still had his pistol up in a shooting position, doubtless in the effort to fire again.

In considering this case with reference to a determination of the grade of offense committed, not only must all the proven facts be considered, but also all attendant circumstances of the tragedy, and every legitimate inference which the jury might draw from such facts and circumstances, and if any of them tend to establish the offense as manslaughter, then the court below erred in refusing to submit that issue to the jury.

Suppose the jury had not notwithstanding the refusal of the court to submit to them the issue of manslaughter nevertheless returned a verdict of guilty of manslaughter, what would have been the duty of the court, and what the legal rights of the defendant?

If there was no evidence to show that the offense was manslaughter, then of course, the verdict should have been set aside. But would any court who would uphold the verdict for murder upon the evidence disclosed in the record, set aside a verdict for manslaughter, because it was wholly unsupported by any testimony? I think not.

The fact that Stevenson armed himself with a winchester rifle, and went back in town after the first difficulty does not necessarily show malice, or prove any of the elements of the crime of murder. He had a perfect right to go back in town; there is not one thing done by him up to the act of this homicide, that was necessarily a violation of law. Wishing to return to the saloon, to farther indulge his appetite, or to go back down town for no special purpose, it was entirely lawful for him to take a gun; and even if he anticipated another attack from Gaines, he had a right to go back, and a right to arm himself in order to his defense in case he were attacked again.

Allen v. United Stated States 157 U. S. 675.

Gourko v. United States 153 U. S. 183.

Thompson v. United States 155 U. S. 271.

If therefore, it be true as it is, that Stevenson's returning to town with a winchester rifle, does not within itself prove any element in the crime of murder, are we not compelled to look at what occurred at the first difficulty between them, as also at the moment, and immediately preceding the killing? This calls for a consideration of conclusions and inferences from facts and

circumstances proven, and these the jury alone was authorized to make. Which saw the other first? Which made the first demonstration to shoot? What meaning should be given to the movement and the declaration of Stevenson, made immediately after the shooting, as testified to by Bandy, "He advanced a step and said come on, I am ready for you?"

If there is any doubt as to whether the testimony did tend to establish manslaughter and not murder, then that doubt should have been resolved in favor of life, and the court should not have refused to submit that issue to the jury; to do so evaded the proper and peculiar functions of the jury, undertook to weigh the evidence, and adjudge what it established.

I respectfully submit that when a human life is the stake that it should be only in the most undisputed and clearest case that the court should ever assume so stupendous responsibility, as to refuse to submit every issue to the jury, properly raised on the pleadings under the law.

W. T. Harris testified (Record 20) that Stevenson was drinking, that is, under the influence of liquor, and that he was excited; just a moment before the killing, this witness testified that Stevenson "walked right up to Bandy's place and called for cider, and wanted everybody to come up and drink; he made a general invitation." This was the conduct of a drunk man, and not that of one cool and sober, and it was the duty of the jury to consider this circumstance and the testimony that he was then under the influence of liquor, in arriving at the grade of offense committed.

It is well settled that there are circumstances in which evidence of intoxication may properly be received to reduce a homicide to manslaughter. Some judges seem not willingly to yield this point, but the better

opinion is, that if for instance, the question is, whether the killing arose from a provocation which was given at the time, or from previous malice, evidence of the prisoner's having been too drunk to carry malice in his heart may be admitted. Bishop Crim. Law.

The modern decisions would seem to go to the length of holding that drunkenness of the prisoner may be considered on the question, whether the prisoner was excited by passion or acted from malice. (32 Engl. Com. L. Rep. 751; 4 Humph. Rep. 141.)

Manslaughter is defined to be the unlawful and felonious killing of another without malice aforethought, voluntary manslaughter is an intentional killing in hot blood, and differs from murder in this, that though the act which occasions death be unlawful or likely to be attended with bodily mischief, yet the malice aforethought, which is the essence of murder is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proportionately lenient. 1 Whart. Crim. Law Ninth Edition. Par. 304.

A person who is secure from further personal aggression has no right to return armed to the scene of conflict with the aggressor. If he did and slay his assailant, the offense will be murder or manslaughter, accordi ng to the particular circumstances. Where the whole proceeding is infected with a continuous excitement, and where the return to the conflict is so immediate and so associated in sentiment as to form part of the same transaction with the original assault, the law applies the original provocation to the fatal blow. What interval of time is necesary to exclude the hypothesis of continuousness is of course dependent upon the circumstances of the case, and the temperament of the individuals. But a good test is the interposition of other subject matters in the mind, and its

intermediate voluntary adoption of other topics. Thus it has been ruled that if, between the provocation received and the mortal blow given, the prisoner fall into other discourse, or diversion, giving him reasonable time for cooling or if he take up and pursue any other business or design not connected with the immediate object of his passion nor subservient thereto, so that it may be reasonably supposed that his attention was called off from the subject of the provocation, any subsequent killing of his adversary especially, where a deadly weapon is used, is murder. It is obvious, therefore that no measurement of time can be adopted in this respect. (1 Whart. Crim. Law, Ninth Edition. Sec. 389.

If the jury under any of the testimony were justified in believing that the defendant killed Gaines while smarting under a provocation so recent and so strong that the defendant may be considered as not being at the moment master of his own understanding, the offense was manslaughter and not murder. the Whart on Homicide 2nd Ed. 449.

Cooling time is a question of fact, dependent, not merely on the moments or hours elapsing after the provocation, but on the intensity of the provocation and the temperament of the accused. In England, it is true, it has been said that while the question of time is for the jury, the effect of that time on defendant is for the court. But even this modification cannot be accepted. Whether the defendant had actually cooled between the injury received by him and the blow is a point to be determined inductively from a series of circumstances (e. g. the nature of the injury and defendant's temperament, his intermediate conduct as well as the lapse of time) in the same way as is the question of intent.

The Court is to charge the jury on such points, but cannot arrogate to itself their absolute and exclusive decision. (Whart. on Homicide 2nd Edition.)

Where it becomes material to inquire whether a homicide committed in the second after a previous combat, in which it might have been manslaughter, was in course of the first or a continuance of it, but after such an interval of time as would imply premeditation, the proper inquiry in such case is, not whether the suspension of reason continued down to the moment of the mortal stroke given, but did the prisoner cool, or was there time for a reasonable man to have cooled? (Whart. on Hom. 2nd Ed. Sec. 459.)

When a particular condition of mind is required to constitute an offense, intoxication may be proved to explain such condition. The true view, is, not that the fact of liquor having been taken affects the issue when the offense is shown to have been premeditated, but that the defendant is proved at the time of the occurrence to have been in a state of mental confusion, of which drink was in part the cause, the fact of such mental confusion may be received to show that the defendant was at the time in hot blood, making him peculiarly susceptible to supposed insult, which would reduce the offense at common law to manslaughter, or that he was not at the time capable of forming a deliberate or specific intent. "If the existence of a specific intention," says Sir J. F. Stephen, "is essential to the commission of a crime the fact that the offender was drunk when he did the act, which, if coupled with that intention would constitute, such crime should be taken into account by the jury in deciding whether he had that intention." (1 Whart. Crim. Law Ninth Edition.)

While intoxication per se is no defense to the fact of guilt, yet when the question of intent or premeditation

is concerned, evidence of it, is material for the purpose of determining the precise degree. (Whart. Cr. L. 7th Ed. Par. 35 et seq.)

Malone vs. State, 49 Ga. 210.

Cluck vs. State, 40 Ind. 263.

People vs. Williams, 43 Cal. 344 (Whart. on Hom. 2nd Ed. Sec. 589.

Possibly there are but few wrongs that so stirs the blood of an American as that of an illegal or wrongful arrest. Our richest inheritance is a love of liberty, and hatred of oppression. Born to freedom, we prize it above everything save honor, and with us tyrants and despots, whether high or low, are despised, and defied, even by the humblest and lowliest; to this sentiment we are more indebted than all else besides to the greatness and glory of America.

Twenty or thirty minutes before this unfortunate homicide Gaines in a bullying, bravado manner had illegally arrested Stevenson as he was quietly and peaceably going to his home; in the demonstration of his power he had forced Stevenson at the mouth of a pistol to throw away his pocket knife, an implement of common use by every man; the arrest was both illegal and wholly unnecessary and manifestly made not in the interest of society, but for the gratification of a poor cringing U. S. Commissioner, who had not the courage to either enforce the law, or defend himself. Unfortunately, Stevenson had been drinking, though entirely quiet at the time of the arrest, and disturbing no one. He immediately became terribly excited, his blood ran up to fever heat, and for the time being he became as a madman, powerless to reason and impotent for self-control.

The refusal of the court to submit to the jury the issue of manslaughter, withdrew from them a consider-

ation of all these circumstances, and all the inferences and conclusions that the jury might rightfully have drawn from them. It should have been left to the jury to determine the extent of the excitement and agitation of Stevenson, and whether he had had sufficient time from the time of his arrest by Gaines, and the time of the killing to regain his self-control.

Whether there has been cooling time is eminently a question of fact, varying with the particular case with the condition of the party. There are some provocations which with persons of even temperament, lose their power in a few moments; while there are others which rankle in the breast for days, and even weeks, producing temporary insanity. Men's temperaments also vary greatly as to the duration of hot blood; and it must be remembered that we must determine the question of malice in each case not by a standard of an ideal "reasonable man" but by that of the party to whom malice is imputed. A man may be chargeable with negligence in not duly weighing the circumstances which would have aroused his passion, or which, when his passion was aroused, would have caused it more speedily to subside. *But he is not chargeable with malice, when he was acting wildly and in hot blood.* Hence, whether there has been cooling time so as to impute to defendant malice is to be decided not by absolute rule, but by the conditions of each case. 1 Wharton Cr. L. 9th Ed. Sec. 480.

II.

As whatever of the assignments of error intervening between the first and thirteenth that seem to demand or require argument have already been discussed in the brief of my associate, I shall proceed to the consideration of the thirteenth, that part of which I desire to discuss being as follows:

"That this defendant has not been convicted by due process of law, and has not had a fair and an impartial trial."

There is very much disclosed by the record in this case, calculated to awaken a suspicion, that the plaintiff in error did not have the full and unmeasured benefit of that constitutional guaranty of a "fair and impartial trial," but perhaps under the rules of law he can not make available in this court, all the wrongs which he may have suffered in the trial in the court below, and it may be that, the court below, was unable to afford to the defendant an entirely fair and impartial trial. Evil influences sometimes exist, both in extent or character, that for the time being seem to be entirely beyond control of the best and greatest efforts. A most important part of a United States Circuit or District Court is the Marshal force, which in the west is usually very large. The marshal's deputies summon the jurors, and the witnesses, they wait on the court, and attend the juries in their retirement. Their official position puts them in confidential relation to the Judge, and all the officers of the court; it brings them in direct contact with jurors, individually and as a body. The jurors are often dependent on a deputy marshal for comforts, and privileges which add to their pleasure. There can be no estimate put upon the combined influence of the deputy marshals around a Federal Court especially in the west, where they are almost as numerous as grasshoppers, and deal with courts, whose territorial jurisdictions extend over immense areas, as does the court held at Paris, Texas, where this plaintiff in error was tried.

I have already referred to that part of the testimony in the case showing that there was a combination among the deputy marshals, the object of which was to

prosecute everyone who hurt or killed one of their number. They are not content to leave the prosecution in such instances to the United States Attorney, but they employ additional counsel, and use money doubtless for every advantage which it will secure. There may possibly be no remedy for this evil which places a defendant under such circumstances at the most manifest disadvantage. One so situated, must make the fight for his life with the greatest odds against him, and though there may be no adequate remedy, it will no doubt, cause this great high court to most carefully scrutinize the record, and unless it is made clearly to appear that the accused was rightfully convicted to grant him a new trial.

The special point to which I desire to direct the attention of the court, is that it does not affirmatively appear from the record that the defendant was personally present at every stage in the proceedings of the trial.

I call attention to the following orders of the court:

"Wednesday, June 19, 1895.

Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, Judge.

THE UNITED STATES
vs. } 535.
JOHN STEVENSON.

This day came on to be heard defendant's motion for a new trial herein; the same being duly argued by counsel, was subitted to the court, and taken under advisement and action deferred."

Record page 12.

"Friday, June 21, 1895.

Court met pursuant to adjournment. Present and presiding, Hon. D. E. Bryant, Judge.

THE UNITED STATES
vs. } 535.
JOHN STEVENSON.

On this day came defendant's motion for a new trial herein; the court *having formerly heard the evidence* and and argument of counsel herein and the court being fully advised in the premises, as it is the opinion of the court that the law and the facts are against the defendant, and the motion is overruled and a new trial herein denied the defendant whereupon in open court, the defendant excepts."

Record page 13.

From this last order it would appear that at the hearing of the motion recited in the first above, there was evidence introduced before the Judge, for it recites that "the Court having formerly heard the evidence."

On page 6 of the record appears the following order:

"April 20th, A. D., 1895.

It is therefore considered by the court that the defendant, John Stevenson, is guilty of murder in the Indian Territory as charged in the indictment, and as found by the jury, and it is ordered that he be remanded to the custody of the marshal and be by him, commited to the jail of Lamar County, to await the judgement and sentence of the court."

It was said by Justice Shiras, speaking for the majority of this court, in Lewis v. United States, 146 U. S. 371, that:

"A leading principle that pervades the entire law of criminal proceedure is that, after indictment found, *nothing* shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel to waive the right to be personally present during the trial."

"It is the right of anyone, when prosecuted on a capital or criminal charge, to be confronted with the accusers and witnesses," and it is within the scope of this right that he be present, not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected." And in the case of Dunn v. Commonwealth, 6 Penn. St. 384, it was held that the record in a capital case must show affirmatively the prisoner's presence in court, and that it was not allowable to indulge the presumption that everything was rightly done until the contrary appears.

In Scwab vs. Berggren 143 U. S. 442, the court said on page 448:

"The personal presence of the accused, *from the beginning to the end of the trial for felony*, involving life or liberty, as well as at the time final judgement is rendered against him, maybe, and must be assumed to be, *vital* to the proper conduct of his defense, and cannot be dispensed with."

This court in referring to the proceedings had in the case of Ball vs. United States, 140 U. S. 118, on page 131 makes this statement:

"On November 15, this order was filed: "By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants, Robt. E. Boutwell and John C. Ball, be executed by being hung, until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States. This done and signed in open court Nov. 15, 1889. Aleck Boarman, Judge."

"It will be perceived that neither in the verdict, nor the order of November 3, nor that of November 15, is it stated of what offense the defendants were found guilty, nor does it appear, nor in our opinion, is it fair-

ly deducible from the record, that the defendants were present when the latter order was entered. It is true that that the record of November 15, has this entry: "This day the defendants in open court excepted to the sentence of the court this day pronounced upon them;" but that admits fairly of the construction that the exception was entered by their attorneys as does the motion in arrest, which though it states that the defendants came in their own proper person and by attorney, is signed only by the attorneys, the record being somewhat obscure as to the point of time during the day when this was done.

We do not think that the fact of the presence of the prisoners can by fair intendment be collected from the record, no mention being made to that effect in the order."

In the case of Dyson v. Mississippi 26 Mississippi 362, 383, it was said: "It is undoubtedly true that the record must affirmatively show those indispensable facts without which the judgement would be void—such as the organizatin of the court; its jurisdiction of the subject-matter and of the parties; that a cause was made up for trial; that it was submitted to a jury sworn to try it (if it be a case proper for a jury); that a verdict was rendered, and judgment awarded. Out of abundant tenderness for the right secured to the accused by our Constitution, to be confronted by the witnesses against him, and to be heard by himself or counsel our court has gone a step further, and held that it must be shown by the record that the accused was present in court pending the trial. This is upon the ground of the peculiar sacredness of this high constitutional right. It is also true, as has been held by this court, 'that nothing can be presumed for or against a record, except what appears substantially upon its face.'"

Continuing, the court said: "This rule has reference to those indispensable requisites necessary to the validity of the record as a judicial proceeding.

If it be true that on the hearing of the motion for a new trial on Wednesday, June 19, that the court heard evidence as recited in the order of Friday, June 21st, that he did, certainly it was indispensable that the defendant should have been present, for certainly there was something done on that occcasion "by which he was to be affected."

It appears that there were several occasions during the progress of the trial of the case that the record does not affirmatively show that the defendant was present in court in his own proper person. This is fatal to the judgment of the court and for this error in the proceedings I submit that the judgment of the court below must be reversed, and the Plaintiff in Error awarded a new trial.

Commending to the Court the brief of my associate Col. Mullen, in which will be found an able discussion of other questions involved in this case, this argument is

Respectfully submitted,

FRED BEALL,

Of Counsel for Plaintiff in Error.

DEC 12 18[illegible]
JAMES H. McKENNEY
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ABSTRACT.

John Stevenson, the plaintiff in error, was, on the 1st day of December, 1893, at a term of the United States Circuit Court for the Eastern District of Texas, indicted for the murder of Joe Gaines.

On the 18th day of April, 1895, the plaintiff in error was

put upon his trial and at a later day he was convicted of murder.

The facts are substantially as follows:

On the 22d day of August, 1893, at Paul's Valley, Chickasaw Nation, plaintiff in error and deceased, Joe Gaines, had a quarrel which resulted in the death of deceased.

It seems that plaintiff in error offered to become bail for a man who had been held by the United States Commissioner in a bond in the penalty of $500, but the Commissioner refused to accept Stevenson as bondsman because he could not qualify to a sufficient amount of personal property. At this refusal the plaintiff in error became offended and abused and cursed the Commissioner. The deceased, who was a deputy marshal, having been informed of this conduct, got his pistol and went out to look for plaintiff in error and found him. (Rec., p. 16.)

Shortly after, deceased went to Stevenson and told him if he did not behave he would arrest him. Stevenson had a knife in his hand and deceased presented his pistol at Stevenson. Deceased finally told Stevenson to go home and come back next morning. Within twenty or thirty minutes after this, Stevenson came back, and was shooting in the streets, when deceased got a pair of handcuffs and his pistol and went again to Stevenson, who had gone into a cider joint and had invited the people to drink with him, holding his gun in his hand. About the time the cider glasses were put down on the counter, a flash from a gun or pistol came through the door. It seems that both deceased and Stevenson fired at the same time. Deceased's pistol had one empty cartridge shell. He

fell with pistol in his hand and the handcuffs were lying by his side. (See evidence of C. B. Ladd, W. L. Robinson and W. R. Bandy, Rec., pp. 17, 18 and 19.)

In the evidence of W. T. Harris (p. 20) we find that both shots from deceased and Stevenson were simultaneous. That deceased's pistol had one empty shell in it. "It looked like it had been freshly fired."

R. A. Smith (on p. 22) says: "I was at Bandy's saloon; saw deceased as he approached; saw one shot fired. He (deceased) came, not in a run, but in a kind of trot, with his pistol in both hands. As he approached the door in a trot he threw his pistol in and fired. * * * I heard two shots close together; the first shot came from the pistol; after that another shot from the inside."

Dr. C. C. Berry and Capt. S. D. Sneed make same statement. (Rec. p. 23.)

All the evidence goes to show that both deceased and plaintiff in error were in hot blood.

R. A. Smith (on p. 22) says: "That about half hour before the killing deceased said he was waiting for Stevenson to come back. Deceased says: 'I ought to have killed the son-of-a-bitch when he was here awhile ago, and if he comes back I am going to kill him.'"

There are eighteen assignments of error, which may be found on pages 25, 26 and 27 of the record.

ARGUMENT.

The first assignment of error is well taken. The court should, by all means, have instructed the jury as to the law of manslaughter. The evidence, as shown in the Bill of Execptions raises that issue. The deceased and plaintiff in error had had hot words just a few minutes before the killing, and the question ought to have been submitted to the jury by the learned court below, as to whether or not the killing was done "without malice." "The crime of murder requires the mind to have acted from deliberation and intelligence; and, where it is clouded by passion, the kiling, as a general proposition, is presumed to spring from the passions, and not from malice, and is only manslaughter."

2 Bish. Cr. Law, §697, 5 Ed.
3 Rice Cr. Ev., 754, 755.

But it may be said that plaintiff in error was resisting arrest. The facts as recited in this record do not show it. Deceased had no warrant of arrest. The offense plaintiff in error had committed, if any at all, was a mere misdemeanor, and not in the presence of the officer. So, if deceased were intending arrest, it was an illegal act on his part, and the resistance to such arrest, even to the taking of the life of the officer, is manslaughter only.

"The books lay down the doctrine in very broad terms, that a homicide consummated in resisting an unlawful arrest, is

manslaughter, and not murder, even though committed by the use of a deadly weapon. The true view of the law, undoubtedly is, that, in all cases, where the fact of an illegal arrest, either committed or attempted, appears, and nothing more, if the person proceeded against kills the officer, or other arresting person, whether with a deadly weapon or by any other means, he may rely upon the legal presumption that his mind was clouded by passion, and so the homicide will be only manslaughter."

2 Bish. Cr. Law, § 699, 5 Ed.

"If a person in resisting arrest, or an attempt unlawfully to arrest him, unnecessarily takes the life of the person so making the attempt, he is guilty of manslaughter, but not of murder, in the absence of proof of express malice."

9 Am. and Eng. Enc. of Law, 587.
Dreunan vs. People, 10 Mich., 168.
Rafferty vs. People, 72 Ill., 73.
Com. vs. Carey, 66 Mass., (12 Cush.), 615.

A homicide is reduced in grade from murder to manslaughter by certain provocations defined by the law, and an illegal arrest, or attempted illegal arrest, is such provocation, if it excites the passion, and that passion has not had sufficient or reasonable cooling time.

Rice Cr. Ev., 592, *et seq.*

The Fourth Assignment of Error is the first exception noted in the Bill of Exceptions. It is as to the admissibility

of the following evidence, of Mrs. Joe Paul: "That she was at the National Hotel in Paul's Valley, and heard the defendant say, in May, 1893, that he intended to kill the next damned marshal that arrested him; that he was tired being pulled around by them."

This was clearly inadmissable, and should not have gone to the jury for any purpose. But the learned judge, in his order allowing the bills of exceptions, appended to the bills of exceptions, gives the following "explanations and qualifications." It "was admitted to the jury for the purpose of showing the animosity and bad feelings of the defendant toward deputy marshals as a class." But we insist that that is the very reason why it should not have been admitted. This language of defendant was used in May and the killing did not occur till the 22d day of August following—nearly three months after. This evidence did not throw any light upon the facts attending the homicide. The record does not show that defendant knew or was acquainted with deceased at that time. Neither is it shown what were the causes that provoked defendant to use such words. In short, the only purpose which such evidence could have, would be to arouse in the minds of the jury a prejudice against the defendant, and it doubtless had that effect, and this is true, notwithstanding any admonitions of the court to the jury that they shall consider it for a certain purpose.

The Seventh Assignment of Error is as to permitting Mrs. Auten to testify in the case against plaintiff in error, without

first serving him with "a list of the witnesses to be produced on the trial for proving the indictment."

U. S. Rev. Stat., § 1033.

We understand this statute to be mandatory to the District Attorney. It is a right given to the defendant, and one that he cannot lose by an omission of his counsel to inform the prosecuting officer that he has not complied with the law. The learned court below endeavors to excuse this error by stating that "no objection was raised and no exception taken upon the trial of the testimony of Mrs. Auten." On page 22 of the Record, we find Mrs. Auten's testimony. She says that she was not subpœnaed in the case; that she came by telegram—"arrived at 4 o'clock this evening."

The Eighth Assignment of Error is as to the refusal of the court to give to the jury the following special charges as requested by defendant.

"That if the jury believe from the evidence that the deceased, Joe Gaines, fired upon the defendant with a pistol, or was making a demonstration as to raise reasonably in the mind of the defendant the apprehension of imminent danger of his life or serious bodily harm, and that defendant acted under that apprehension and killed the deceased, that he would be acting in his own self defense, and to acquit the defendant." (Rec., pp. 14, 15.)

This is certainly the law, and in the light of the evidence, as shown on pages of the Record 22 and 23, should have been given to the jury.

The next special charge asked by the defendant and refused by the court, is as follows:

"That if the jury believe from the evidence that the defendant did kill Joe Gaines, and if you further believe from the evidence that at the time of the killing the deceased was making such an attack upon the defendant as to produce a reasonable expectation or fear of death or some serious bodily harm, or if you believe from the evidence that at the time of the killing the deceased was threatening to take the life of the dedefendant and did then by some act done manifest his intention to execute the same you will acquit him. Nor is it necessary or required that the defendant should retreat, or that the danger be actual and real, if such danger under the circumstances surrounding the parties reasonably appeared so to defendant; the question is not one of actual danger, but of reasonable apprehension of danger, and is one, which in all fairness, can only be determined by the facts as they appeared to the defendant at the very time of the homicide."

This charge is also law, and under the facts as shown by the Record, should have been given to the jury.

The learned judge below, in his certificate to the bill of exceptions, says that his reason for not giving the special charges was that "the court conceived that the subject matter stated in the charges asked was fully covered by the general charge of the court." The learned judge may have charged the jury on the *subject matter*, but he does not say that he charged the jury in substance as asked by the defendant.

"In order to justify a homicide on the ground that it was committed in self-defense, it must appear that the defendant, at the time he caused the death of deceased, was acting under the belief that he was in imminent danger of death or great bodily harm from deceased, and that it was necessary for him to strike the fatal blow, or to perform such other act causing the death of deceased, in order to avoid the death or great bodily harm which was apparently imminent."

6 Am. and Eng. Enc. of Law, 593, and authorities there cited.

"And, again, it has been decided, most favorable to defendant, that the existence of the reasonable apprehension of actual or apparent danger is to be considered from the standpoint of the defendant at the time of the homicide, and not from the standpoint of the jnry in the light of the facts proved," *Ib.*

Wharton, in his article entitled "Fear: Its Legal Limitations," (15 Cent. L. J., 262), says: "A similar question arises in the criminal law, and is discussed by me in detail in the eighth edition of my work on that branch of jurisprudence. Is the danger that excuses the homicide of an assailant to be viewed (*1*) from the defendant's standpoint; or (*2*) from the standpoint of the jury, with all the facts before them; or (*3*) from the standpoint of an ideal reasonable man? No doubt we have very high authority to the effect that unless the defendant's fear is 'reasonable' in one of the two latter senses, it should not avail. It is certainly clear that an erroneous idea

of danger, when negligently adopted, so far from being an absolute defense to an indictment for homicide, perpetrated under the influence of such fear, would be ground for manslaughter. On the other hand, I apprehend that the great weight of authority now is to the effect that an honest, non-negligent belief of danger to life will be an excuse to a homicide committed under such fear. The leading case on this topic, that of Levett, was that if a man suddenly roused from his sleep by a noise in the kitchen, and supposing a burglar to be in the house, killing the supposed burglar, who was in fact only a visitor of one of the servants. This was held to be an excusable homicide, though Foster properly says, in his criticism of the case, that if Levett had negligently come to this conclusion, the case was one of manslaughter. This case has been followed by many others in which this, which may be called the subjective test, is followed, and in which it is *held* that the reality of the fear is to be determined from the standpoint of the party accused. In Pennsylvania, in particular, very able judges, masters of criminal law, have laid down this position with great emphasis, it being there *held* that the issue is, not what the jury, with all the evidence before them, would believe, or what would an ideal reasonable man believe, but what was the belief of the defendant himself."

"The question whether, under all the circumstances, there are grouds for a reasonable belief in the mind of the slayer that a necessity existed for taking the life of the other is one for the determination of the jury, in the solution of which the

condition of both parties at the time is a legitimate subject for consideration."

6 Am. and Eng. Enc. of Law, 597, and authorities there cited.

"The rule of law, founded on justice and reason, is, that *actus non facit reum nisi mens sit rea*,—the guilt of the accused must depend upon the circumstances *as they appear to him*."

2 Whart. Cr. Law, § 1027, (6 Ed).

There are many other assignments of error, some of which are not supported by the Record, but are doubtless true in fact. The bill of exceptions is very inartistically drawn. The idea seems to have been that the motions for a new trial made in the court below, would form a part of the record in this court. We learn from the motion for a new trial that much prejudice and passion were shown against the defendant, of which he complains in his motion for a new trial. It seems that some of the witnesses, who were also deputy marshals, had contributed toward the payment of attorneys' fees, for the prosecution of plaintiff in error. (See Rec., pp. 21, 22.) We find also on page 10 of the Record, that H. H. Lindsay, a deputy marshal, and the witness whom defendant asked to have put under the rule as mentioned in Assignment No. 9,—and also Sixth Exception, on page 14,—had made a wager of $120 that defendant would be convicted.

We conclude, without further notice or comment on the other assignments of error, that the plaintiff in error did not

have such a trial of his case as was his right under the laws of the United States.

For these reasons, we submit this case to the court, confident, that for the many errors committed to the prejudice of the plaintiff in error, the case should be reversed and a new trial awarded.

Respectfully submitted,

JOSEPH P. MULLEN,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
FEB 27 1896
JAMES H. McKENNEY,
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In the Supreme Court of the United States.

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POINTS AND ARGUMENT.

The first, fourth, seventh, and eighth assignments are the only ones insisted upon in the brief for plaintiff in error by Mr. Mullen.

The brief states:

> There are many other assignments of error, some of which are not supported by the record, but are doubtless true in fact. * * *
>
> We conclude, without further notice or comment on the other assignments of error, that the plaintiff in error did not have such a trial of his case as was his right under the laws of the United States. (Brief, pp. 11, 12.)

The brief filed by Mr. Beall treats only of the first and thirteenth assignments. (Brief, pp. 8 and 26.)

None of the assignments will be discussed which are thus abandoned.

I.

The first assignment is as follows:

> The court erred in failing and refusing to submit to the jury a charge upon manslaughter, *the evidence clearly raising that issue and necessitating a charge thereon.* (Rec., p. 25.)

This assignment is based on paragraph 7 of the bill of exceptions, as follows:

> Be it further remembered that the defendant, through his counsel, requested the court to submit to the jury a charge upon manslaughter, but the court refused to submit that issue to the jury, to which action of the court, in failing and refusing to submit to the jury such charge, the defendant at the time excepted, *because the evidence clearly raised that issue that demanded a charge thereon.* (Rec., p. 14.)

It will be seen from the supplemental record (p. 2) that the words "because the evidence clearly raised that issue that demanded a charge thereon" were improperly inserted in the bill of exceptions, as originally sent up, and that they are not a part of the record.

The bill of exceptions does not say that all of the testimony is set out.

Every presumption is in favor of the action of the trial judge, and unless the record shows affirmatively that there was error, his action will be sustained; and

where the record does not purport to be complete, and the error assigned is based upon questions of fact, it will be presumed that there were facts before the trial judge which justified his action.

It is not shown whether or not the defendant testified. He may have testified, and may have made admissions which entirely overcame any evidence, if there be any in the record, tending to show grounds upon which manslaughter might be predicated.

An examination of the testimony will show that there was nothing to warrant the judge in charging upon the question of manslaughter.

The uncontradicted testimony of Mrs. Joe Paul shows the animus of the defendant, he having stated to her that "he was getting tired of being pulled around by deputy marshals; he was going to kill the next one that arrested him." (Rec., p. 21.)

That he was not moved by a sudden passion, and that he was utterly regardless of human life, is shown by the testimony of Hamm, to whom he voluntarily stated, about thirty minutes after the shooting, "that this was the third son of a bitch he had shot or killed" (Rec., p. 21); and by the testimony of Scrivener, to whom he voluntarily stated, "that all he hated about it was that he did not kill that other son of a bitch, Bluff Davidson." (Rec., p. 21.)

He told Martin "that he did not care any more for killing him than if he was a damned snake." (Rec., p. 21.)

Mrs. Auten heard Stevenson say "that he did not think any more about killing him than he would a squirrel." (Rec., p. 22.)

The testimony shows he was a town bully and a border ruffian, bent on running amuck and terrorizing the community.

The circumstances which led up to the killing were as follows:

B. D. Davidson, United States commissioner, was holding court on August 21. He had bound over a man by the name of Mitchell, and refused to take the defendant, Stevenson, on his bond.

For this judicial act Stevenson followed up Davidson and cursed and abused him, calling him scurrilous names. Davidson told him he was no fighting man, and he cursed Davidson until he was satisfied, and went off cursing and swearing. (Rec., pp. 16, 17, 20.)

Gaines, the deceased, held the office of constable and United States deputy marshal. (Rec., p. 15.) He went up to arrest Stevenson, who was cursing and swearing in public. (Rec., p. 16.) When Gaines went to arrest Stevenson, Stevenson had a knife in his hand, and caught Gaines by the lapel of his coat. (Rec., pp. 17, 18.)

It is perfectly plain from the testimony that he kept his knife in hand for a deadly purpose, and was holding on to Gaines so as to have the advantage of being near him to prevent him from drawing his pistol. (Rec., p. 17.)

This is shown by the testimony of Roberson, who said that Stevenson said to Gaines, "Don't draw that pistol. If you do I will cut you." (Rec., p. 18.)

Gaines told Stevenson that he was an officer, and that he must put up his knife and behave himself. Stevenson

then offered to go into combat, telling him to "draw his gun and he would cut his heart out." (Mrs. Roberson, Rec., p. 21.)

Gaines told him that he did not want to have any trouble with him, and said, "I am a friend to you, and you must put up your knife and behave yourself." (*Ib.*)

When he turned Gaines loose, Gaines drew his pistol, and made him drop his knife, threatening to kill him if he did not do it. (Rec., p. 17.)

After effecting the arrest Gaines turned Stevenson loose upon his promise that he would go home and go to bed and come back at 7 o'clock in the morning. (Rec., p. 16.)

Stevenson's wife was with him.

Stevenson went off, saying, "I will go home and get my Winchester and come back, and I will make the son of a bitch hide out." (Rec., pp. 18, 21.)

Witness Harris testified that he "heard Stevenon says he would go home and get his gun and kill the damn son of a bitch; heard him repeat this, I suppose, half a dozen times." (Rec., p. 20.)

In thirty minutes from that time Stevenson came back and fired two shots, crying, "Hide out, Stevenson is in town yet." (Rec., pp. 16, 18, 20, 21.)

He went off, deliberately got a gun, and came back. (Rec., p. 19.)

He went into a saloon, holding his gun all the time. (Rec., p. 19.)

Gaines heard the shooting, picked up his pistol, and went out, saying that he would go and get Stevenson and fasten him, and keep him in charge, and not release him any more. (Rec., p. 16.)

He started to the saloon where Stevenson was.

When Stevenson saw Gaines coming, he "advanced a step and said, 'Come on, I am ready for you.'" (Rec., p. 20.)

The eagerness and promptness of the defendant to shoot is shown by the fact that he did not even raise his gun to his shoulder, but "threw his gun right across his arm and fired." (Harris, Rec., p. 20.)

When he went into the place where he did the shooting "he was holding the gun with his finger on the trigger and his thumb on the hammer, and he held same in this position nearly all the time." (Harris, Rec., p. 20.)

There was evidence tending to show that Gaines fired first. (Berry, Sneed, Rec., p. 23.)

Stevenson may have acted in self-defense. This was a possible theory. The jury passed on that question, and adversely to him. As to there being anything in the case to justify the submission to the jury of the issue of manslaughter seems entirely out of the question. He was guilty of murder, if anything. He was guilty of murder, or committed justifiable homicide.

When this appears from the record it follows that it was not error in the trial judge to refuse to charge on the grades of murder. (*Sparf* v. *United States*, 156 U. S., 51, 63.)

But nothing in the record shows that any instruction was tendered. If any was presented, it is not set out. It may have been erroneous. If erroneous in any respect it would have been the duty of the judge to refuse it.

Where the charge as given is correct, failure to charge upon any point is not error unless a correct request be submitted. (*Isaacs* v. *United States*, 159 U. S., 487.)

The charge is not set out in the record. There is nothing to show what the judge charged.

On this first assignment a very elaborate argument is made by Mr. Beall, to show that the court erred in not charging upon manslaughter. A very broad foundation is laid beginning with the affair with the commissioner and no detail giving color to the contention is omitted.

His brief (p. 2) seems to advance the idea that Stevenson was in a manner warranted in abusing the commissioner for his judicial action, because, after court was over he had gone to a "cider joint."

The testimony on this point shows that the commissioner was in the back part of the house, lying down reading a book. (Rec., p. 16.)

The conduct of the commissioner is also inferentially criticised, because he did not vindicate his judicial action by fighting Stevenson, who addressed to him language which, as the brief says, "no honorable man deserves and no brave man would wear." (Brief, p. 2.)

If he had called for pistols and coffee, or even cider, for two, he at least would not have been obnoxious to this criticism.

After setting out a number of authorities, on pages 9 to 14, inclusive, to establish the doctrine—which is not disputed—that, if there was any proof tending to show that the crime of manslaughter was committed, it was the duty of the judge to charge upon that aspect of the

case, the brief goes on, pages 14 *et seq.*, to examine "*the facts and circumstances disclosed in the record,*" which establish the basis upon which the contention that there was an issue as to manslaughter is predicated.

The first point made is that the defendant is an American citizen, and was, as is recorded of McGregor, "upon his native heath," and that he had a right, under the Constitution, to have and bear arms.

The record does not show what country Stevenson honored by his birth.

An American citizen in this country has no right to have these facts considered as affecting the grades of crime, and in this respect stands on the same footing that a foreigner would.

The right to bear arms is something quite apart from the right to go cursing and firing off a gun through the streets and announcing that peaceable citizens had better hide out.

The next significant proposition is that the United States commissioner "showed himself as deserving of abuse."

The first reason given is that "he confessed himself a hanger-on and lounger around drinking saloons." (Brief, p. 15.)

This is a very liberal expansion of the testimony of the commissioner, who merely said that the weather was warm, and he had gone into the back part of Bandy's place to lie down on a cot and read a book. (Rec., p. 16.) In looking at the other facts set forth in the argument, this liberal interpretation suggests the admonition *ab uno disce omnes.*

The fact that a magistrate is sheltered by the same roof where drinks are sold does not give a broad license to abuse him.

The next circumstance relied on in mitigation of cursing the magistrate is that "his conduct showed him possessed of neither the moral nor physical courage to defend himself *or vindicate the law which he had solemnly sworn to maintain*." (Rec., pp. 15, 16.)

The learned counsel doubtless wrote *currente calamo*, and did not mean this seriously.

It is not necessary that the doctrine of nonresistance should be approved as a foundation for repudiating any suggestion that either the civilization of this age or a proper sense of personal manhood and honor requires a magistrate, whether of high or low degree, to "maintain the law" by engaging in personal combat.

If we are going to establish that standard, then, in selecting judges and passing on their qualifications, due regard should be paid to their skill in the use of deadly weapons, so that they may be on a footing of equality with those with whom they are bound to fight to maintain the dignity of the ermine.

And in order that all litigants may be in a position to enforce their rights according to their own construction by holding personal responsibility *in terrorem* over the judges, the system should be by law expanded so as to provide redress for all classes. Guardians *ad litem* and *procheins amis* should be compelled to vindicate the cause of those whom they represent.

Judges should be assorted, so that each suitor can have a choice and pick his match, whether it be a Brian de Bois Guilbert or a Ralph de Vipont.

Widows and old maids should be permitted to select a champion, and if none volunteer, they should be appointed out of the ranks of widowers and bachelors.

Those who, like John Phenix, do not wish to hazard deadly combat, should be allowed to chalk out the size of the judge, and if they hit within the lines the judge should admit that he is vicariously killed, and at once become *civiliter mortuus*.

Adequate provisions should be made for the halt, the lame, the blind, and infirm; and remaindermen and beneficiaries under springing and shifting uses and executory devises, who come into being after the judges have gone hence, should be permitted to wreak their vengeance upon their ashes.

This happy system would at least have the beneficent effect of abolishing case law. Then the lawyer, like the old circuit rider, could carry his equipment in his saddlebags, and the ghost of Bentham would be appeased with the disappearance of—

> That lawless science of the law,
> That myriad of precedents,
> That wilderness of single incidents.

The next point made (Brief, pp. 16, *et seq.*) is that Gaines had no right to arrest Stevenson, except upon a warrant duly and legally issued.

By section 33 of the act of May 2, 1890 (Supplement to the Revised Statutes of the United States, vol. 1, p. 735), the criminal law in force in Arkansas, as set forth

in Mansfield's Digest of 1884, with certain exceptions therein set out, was extended to the Indian Territory.

Section 1800 of said Mansfield's Digest provides that any person willfully disturbing the peace and quiet of any town by loud noise, or violent or profane language, or by threatening to fight, or shooting off any firearms shall be guilty of a misdemeanor.

Section 1802 makes it a misdemeanor for any person to use profane, violent, abusive, or insulting language toward or about another person in his presence or *hearing*.

Section 1803 makes it the duty of every constable who may have *personal* knowledge of the commission of any breach of the peace, as defined in the *last* preceding section, *to arrest* such offender and bring him to trial.

This authorizes arrest without warrant.

Section 1880 makes everyone who shall profanely swear or curse forfeit $1 for every offense.

Section 591 provides as follows:

> If any offense cognizable before a justice of the peace shall be commited *in the presence of a constable* it shall be his duty to arrest the offender and take him before a justice of the peace.

The proof shows that Stevenson not only cursed Davidson in the house, but went out on the street cursing and swearing. (Rec., p. 16.) Davidson said, "He left, still cursing, and went south. I could still hear him cursing and swearing." (Rec., p. 16.)

While this was going on, Gaines came in and asked what it was all about, and then said he would go and arrest him.

He must not only have heard the cursing, but must have seen Stevenson when he was cursing, for he came in just at the time Stevenson went out.

Davidson goes on in the same connection and says, "Gaines, the deceased, came in and asked me what all this fuss was about; I told him what had happened; he says, 'I will go and arrest him and stop him.'" (Rec., p. 16.)

Even if he was not in sight when he was cursing, and was on the outside of the house at that time and Gaines was on the inside of the house, nevertheless he must have been within the hearing of Gaines, for he was within the hearing of Davidson.

It is not necessary in order to warrant arrest that the officer should actually see the person committing the offense. There is constructive presence well recognized in the law. (Bouvier's Law Dictionary, "Presence;" Black's Law Dictionary, "Presence;" Anderson's Dictionary of Law, "Presence.")

It was held in *Brady* v. *Georgia* (48 Ga., 311) that obscene language was uttered *in the presence* of a female, although she was at the time in a house and not in sight, although in hearing of the person uttering it.

In *People* v. *Bartz* (53 Mich., 493) it was held that the wanton discharge of a firearm in the public street was *in the presence* of an officer, though it was done at some distance and in the dark, and he could not see the person because it was dark.

Gaines not only had a right to arrest Stevenson for the swearing, but when he heard him shooting and hallooing

in the town, it was his duty to arrest him, under sections 1802 and 1803.

The next point emphasized is the manner of the first arrest and the character of the man arrested.

The rapidity of the marshal's movements is graphically portrayed. He came "all at once," *ventis et fulminis ocior alis*, and "rushed up behind the *two gentlemen*," one of whom was Stevenson. (Brief, p. 16.)

If Stevenson was a gentlemen, this manner of approach was perhaps very indecorous. But counsel, doubtless, if he so characterized Stevenson intentionally, meant it merely as an euphemism, upon that well-recognized system of contraries, in accordance with which the Fates were called *Parcæ, quia non parcebant.*

This "gentleman" cursed and reviled the magistrate because he would not take him as a bondsman, using the coarsest epithets. According to the contention of his counsel, he was drunk in the public street, firing his gun, and with a wild-western whoop, loud enough to be heard all over the village, gave a wholesale warning to people to hide out because he was in town. (Brief, p. 18.)

He had killed two men before he killed Gaines, and boasted of it. He thought no more about killing Gaines than he would a squirrel, and "all he hated about it was" that he did not kill Davidson. (Rec., pp. 21, 22.)

In view of the aspects of this case, which counsel has in the earnestness of his advocacy presented, it is not surprising that he should think that "it was no doubt impossible for the learned judge who tried this case below, *as it is quite impossible for the members of this court,*

to fully appreciate that scene in all its import." (Brief, p. 18.) This depends, of course, upon the point of view.

It is further urged that the conditions going to make up an issue of manslaughter are found in the facts of passion and excitement produced by drink.

The brief says (p. 18) that Stevenson was "under the influence of liquor." It says that his whoop, "Hide out; Stevenson is in town!" loud enough to be heard all over the village, "could only betoken a drunken man, thoroughly wrought up to the highest pitch of unnatural excitement." (Brief, p. 19.)

The brief further says (p. 21) that "W. T. Harris testified (Rec., p. 20) that Stevenson was drinking—*that is, under the influence of liquor* and that he was excited—just a moment before the killing."

Again: "Unfortunately, Stevenson had been drinking" (p. 25).

Again: "It is well settled that there are circumstances in which evidence of intoxication may properly be received to reduce a homicide to manslaughter" (p. 21).

Again: "When a particular condition of mind is required to constitute an offense, intoxication may be proved to explain such condition" (p. 24).

There is no evidence that Stevenson was drunk. There is no evidence that there was anything of an intoxicating character there.

There was no proof that the cider was hard. The killing was in August, the sweet-cider season.

In *Eureka Vinegar Co.* v. *Gazette Printing Co.* (35 F. R., 571) Judge Caldwell said that *no court would be justified in affecting ignorance* of the meaning of the word

"cider." This seems sound. The learned judge, however, went further and said in that case that sweet cider is not "cider," and that before fermentation the "juice of the apple" is "simply apple juice," and that "cider" is fermented juice. That was obiter, for in that case the cider was admitted to be "old hard cider."

Even hard cider has not always been tabooed—certainly not during "the wild campaign of 1840, a year when staid ministers and elders in church and state, clothed in motly garb and inspired by patriotism and 'hard cider,' marched side by side with the jeunesse dorée, and vied, the one with the other, in the worship of raccoons, log cabins, and poke stalks."

It was held in a case calling directly for expression of the court on the point by Chief Justice Gray, in *Commonwealth* v. *Chappel* (116 Mass., 7), that in the absence of proof as to its character, it would be presumed that cider was not intoxicating.

A like conclusion was reached in *State* v. *Rooch* (75 Me., 123) and *Feldman* v. *Morrison* (1 Ill. App., 460).

Harris does state that Stevenson called for cider and invited everybody up to drink, and that he "was drinking at the time." (Rec., p. 20.)

It is probable he meant by this that at the time the affray began he was drinking cider, as it is shown in the same connection that he had invited the others up to drink. There is nothing to show that Harris said he was intoxicated or that he had been drinking intoxicating liquor.

The statement in the brief that Harris stated that "he was under the influence of liquor" is a mere conclusion of counsel.

There was no effort made to prove that Stevenson was intoxicated, and to such a degree that the grade of his offense should be reduced.

If he had been intoxicated, this fact was capable of easy and direct proof.

To clinch the interpretation put upon the testimony of Harris the brief (p. 21) says that "Stevenson 'walked right up to Bandy's place and called for cider, and wanted everybody to come up and drink; he made a general invitation.' *This was the conduct of a drunken man*," *etc.*

In short, the court is asked to hold that the fact that a man displayed the liberality of asking everybody present to come up and drink is evidence that he was drunk.

This is the only redeeming trait disclosed by the record in Stevenson's character, and he should have the benefit of having it credited as an attribute of his normal nature, and not as a sporadic outburst of drunken frenzy.

After urging the argument of manslaughter, based upon sudden heat and passion and excitement, engendered by outrage and liquor, the brief, in this connection—and, it seems, somewhat illogically—says that, notwithstanding "he had not had time for sober reason to return under all the circumstances," "his conduct shows nothing beyond a disposition to assert his rights and, if necessary, defend them." (Brief, p. 18.)

This, it seems, concedes what the Government contends for, and shows that the passion and excitement attributed to him did not exist, and that he was in that condition and acted with that deliberation, that he either defended himself or committed murder.

II.

The fourth assignment is as follows:

> The court erred in permitting the witness Mrs. Joe Paul to testify, over the objections of the defendant, that "in May, 1893"—before the homicide, on the 22d day of August—"that she was at the National Hotel, in Pauls Valley, and heard the defendant say that he (defendant) intended to kill the next damned marshal that arrested him; that he was tired of being pulled around by them," when there was no evidence to show that at that time the defendant knew deceased, or that at that time he was a deputy marshal; nor was there any evidence showing that the defendant had ever been arrested or pulled around before this time, or knew that Joe Gaines was a deputy marshal. (Rec., p. 25.)

The exception on which this is based is as follows:

> Be it remembered, that on the trial of the above-entitled cause the court, over the objections of the defendant, permitted the Government witness Mrs. Joe Paul to testify "that she was at the National Hotel, in Pauls Valley, and heard the defendant say, in May, 1893, that he intended to kill the next damned marshal that arrested him; that he was tired being pulled around by them;" to which testimony the defendant at the time excepted and asked that their exceptions be entered upon the record in this cause, which was done. (Rec., pp. 13, 14.)

This statement in the bill of exceptions, as made up for plaintiff in error, was, before signing, qualified by the judge as follows:

> The foregoing bills of exception are allowed and ordered filed in connection with the following explanations and qualifications:

> First. The testimony of Mrs. Joe Paul, as stated in bill of exceptions No. 1, was admitted to the jury for the purpose of showing the animosity and bad feeling of the defendant toward deputy marshals as a class. *This statement was made at the time, and the jury instructed that it was admitted for that purpose only.* (Rec., p. 23.)

This was a circumstance proper to go to the jury in determining the animus and as explanatory of the acts of the defendant.

Great latitude in the admission of such evidence is allowed to the discretion of the trial judge. (*Alexander* v. *United States*, 138 U. S., 353; *Holmes* v. *Goldsmith*, 147 U. S., 150; *Moore* v. *United States*, 150 U. S., 57; *Thiede* v. *Utah Territory*, 159 U. S., 510.)

The defendant, so far as the record shows, did not deny his general ill will toward United States marshals. This evidence could not have prejudiced his plea of self-defense, and it was proper for the jury to consider it.

It had a direct bearing on the question of malice, which was an ingredient of the crime of murder.

Malice may be proved by direct evidence, such as prior threats or seeking an opportunity to perpetrate the act. (Rice, Crim. Ev., III, sec. 275.)

It is always competent to prove a previous threat to show malice or animosity. (*Murphy* v. *People*, 63 N.Y., 590; *Hinds* v. *State*, 55 Ala., 145.) It is said that this threat was not against the deceased by name and that it was not shown that the defendant knew him, but it was against a class to which he belonged, and was a declaration by plaintiff in error of a purpose to kill the next marshal who should arrest him.

This evidence showed malice prepense. In showing this state of mind on the part of the person indicted, it is not restricted to spite or malevolence toward the deceased in particular. It may be shown that the defendant entertained a general malignity and recklessness of the lives of others, which proceeded from a heart void of a sense of social duty and fatally bent on mischief. (Greenleaf on Evidence, vol. 3, sec. 144.)

Thus, if a defendant attempt to kill A and by accident kills B, the law implies malice. (Greenleaf on Evidence, vol. 3, sec. 145.)

In *Res* v. *Mulatto Bob* (4 Dall., 146) the language of the defendant was, "I will split down any fellow that is saucy," and this was held admissible.

Threats against a class may be put in evidence as explaining the character of an attack on an individual belonging to this class. (*Hopkins* v. *Com.*, 50 Penn. St., 9, 15; *Dixon* v. *State*, 13 Fla., 636, 645.)

III.

The seventh assignment is as follows:

> The court erred in permitting the witness Mrs. Auten* to testify on the trial of this cause in behalf of the Government, said witness never having been subpœnaed in said cause or her name indorsed upon the back of the indictment, or any notice whatever served upon the defendant or his counsel that she was to be used as a witness in said cause. (Rec., p. 26.)

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* In exception Orten appears, but it is doubtless the same.

This is based on the following exception:

> 4. Be it further remembered that on the trial of this cause the court permitted the witness Mrs. Orten to testify as to statements made by the defendant, said witness never having been subpœnaed in said cause or her name endorsed on the back of the indictment, or any notice whatever served upon the defendant or his counsel that she was to be used as a witness in said cause. (Rec., p. 14.)

This statement in the bill of exceptions as made up is modified in the bill of exceptions by the judge, who sets forth that "no objection was raised and no exception was taken upon the trial of the testimony of Mrs. Auten." (Rec., p. 24.)

It would be out of the question to permit a defendant to take the chances of acquittal and then have a reversal because an incompetent witness testified without objection. He waived his right by not excepting at the time. (*United States* v. *Cornell*, 2 Mas., 103; *United States* v. *Curtis*, 4 Mas., 244.)

IV.

The eighth assignment is as follows:

> The court erred in refusing to give the special charges 1 and 2, as requested by the defendant. (Rec., p. 26.)

This is based on the following exceptions:

> 8. Be it further remembered that the defendant requested the court to charge the jury in this case as follows, to wit: "That if the jury believe from the evidence that the deceased, Joe Gaines, fired upon the defendant with a pistol or was making a demonstration as to raise reasonably in the mind of

the defendant the apprehension of immediate danger of his life or serious bodily harm, and that defendant acted under that apprehension and killed the deceased, that he would be acting in his own self-defense and to acquit the defendant," which special charge the court refused to give, and the defendant at the time excepted and asked this exception be entered upon the record in this cause. (Rec., pp. 14, 15.)

9. Be it further remembered that the defendant requested the court to charge in this cause as follows, to wit: "That if the jury believe from the evidence that the defendant did kill Joe Gaines, and if you further believe from the evidence that at the time of the killing the deceased was making such an attack upon the defendant as to produce a reasonable expectation or fear of death or some serious bodily harm, or if you believe from the evidence that at the time of the killing the deceased was threatening to take the life of the defendant, and did then by some act done manifest his intention to execute the same, you will acquit him. Nor is it necessary or required that the defendant should retreat or that the danger be actual and real, if such danger under the circumstances surrounding the parties reasonably appeared so to the defendant; the question is not one of actual danger, but of reasonable apprehension of danger, and is one which in all fairness can only be determined by the facts as they appeared to the defendant at the very time of the homicide," which charge the court refused to give, and the defendant at the time excepted and tenders his bill and asks the same to be signed and made a part of the record in this cause. (Rec., p. 15.)

The judge states in the bill of exceptions that these requests were refused "because the court conceived that

the subject-matter stated in the charges asked was fully covered by the general charge of the court." (Rec., p. 24.)

The general charge is not in the record, and in its absence the presumption is that the trial judge was right.

V.

On page 11 of the brief of Mr. Mullen occurs the following:

> It seems that some of the witnesses, who were also deputy marshals, had contributed toward the payment of attorneys' fees for the prosecution of plaintiff in error.

While this is not insisted on as error, the fact of its being called to the attention of the court makes it proper to say in reply that these facts, so far as shown in the bill of exceptions, only went to the credibility of the witnesses, and the jury passed on this.

The sufficiency of the testimony will not be reviewed in this court if any competent evidence went to the jury on which the verdict could be founded. (*Crumpton* v. *United States*, 138 U. S., 361.)

It is not shown that there was any objection to the witnesses' testifying, or any request that their evidence be withdrawn.

VI.

On page 11 of the brief of Mr. Mullen occurs the following:

> We find also on page 10 of the record that H. H. Lindsay, a deputy marshal and the witness whom

> defendant asked to have put under the rule as mentioned in assignment No. 9, and also sixth exception, on page 14, had made a wager of $120 that defendant would be convicted.

The brief should have added that there is nothing in the bill of exceptions which shows this fact, and that it only appears as an unsupported assertion in the motion for a new trial.

VII.

The second point discussed in Mr. Beall's brief (pp. 26, *et seq.*) is based on the thirteenth assignment, and deals with that part of the assignment which says "that this defendant has not been convicted by due process of law and has not had a fair and an impartial trial."

The whole assignment is as follows:

> That this defendant has not been convicted by due process of law and has not had a fair and an impartial trial and has not been convicted upon sufficient legal testimony, but by an unprecedented oppression and steel-ribbed prosecution of the deputy marshal force of this court; that the deputy marshals, Martin, Scrivner, and Lindsay, each and all, not only contributed their money to convict this defendant, but Lindsay wagered the sum of $120 that this defendant would be convicted, and the witness Scrivner held the money, awaiting the verdict in this cause, as is fully set out in defendant's twelfth assignment in his amended motion for a new trial in this cause. (Rec., p. 26.)

The brief proceeds as follows:

> A most important part of a United States circuit or district court is the Marshal force, which in the

> West is usually very large. The marshal's deputies summon the jurors and the witnesses; they wait on the court and attend the juries in their retirement. Their official position puts them in confidential relation to the judge and all the officers of the court; it brings them in direct contact with jurors individually and as a body. The jurors are often dependent on a deputy marshal for comforts and privileges which add to their pleasure. There can be no estimate put upon the combined influence of the deputy marshals around a Federal court, especially in the West, where they are almost as numerous as grasshoppers, and deal with courts whose territorial jurisdictions extend over immense areas, as does the court held at Paris, Tex., where this plaintiff in error was tried.
>
> I have already referred to that part of the testimony in the case showing that there was a combination among the deputy marshals, the object of which was to prosecute everyone who hurt or killed one of their number. They are not content to leave the prosecution in such instances to the United States attorney, but they employ additional counsel, *and use money doubtless for every advantage which it will secure.* (Brief, pp. 27, 28.)

It can hardly be contended that all of the facts above set out appear in the record, or that, even if true, the court can take judicial cognizance of them.

The brief, indeed, seems to admit that the court can not reverse for what is urged in the above quotation, but says that these facts "will, no doubt, cause this great high court to most carefully scrutinize the record, and, unless it is made clearly to appear that the accused was rightfully convicted, to grant him a new trial." (Brief, p. 28.)

If there be error of law, the court will reverse regardless of these considerations. Under no circumstances, however, must the Government make it "clearly to appear that the accused was rightfully convicted." That proposition would involve not only the action of the court, but the action of the jury, which latter is not open for review.

The brief proceeds (p. 28) to urge that it does not affirmatively appear that the defendant was personally present at every stage in the proceedings of the trial.

Attention is called to the orders of the court (Rec., p. 12) showing that the defendant made a motion for a new trial, and failing to show that he was present when it was argued and submitted to the court.

On page 29 of the brief an order of June 21, 1895 (Rec., p. 13), is set out, which recites that the court, "having formerly heard the evidence and argument of counsel herein," overruled the motion.

The order recites, "Whereupon, in open court, defendant excepts."

On the same page of the brief part of an order of April 20, 1895 (which appears on pages 5 and 6 of the record), is set out.

Through mistake of counsel, the words "April 20, A. D. 1895," which appear on the left side of the page of the record, and are manifestly a part of the written verdict of the jury, and which were incorporated into the order of April 20, 1895, as a part of the verdict, which order, after incorporating the verdict, proceeds to remand the prisoner to the custody of the marshal, are treated as

the date of and part of a separate order. From this, it seems, the inference is drawn by counsel that the prisoner may not have been present, but when we turn and read the entire order, beginning on page 5, of which this extract set out in the brief is a part, it appears that it is affirmatively recited that the defendant was present "in his own proper person."

It is said that the record does not show affirmatively that he was personally present when the motion for a new trial was made.

That was no part of the trial. It was his motion, made by him after a conviction. The record shows affirmatively that he was present throughout the time of the trial, conviction, and sentence.

It has never been held that a defendant must be present upon his own motion for a new trial, for that is not a proceeding by the Government adverse to him.

The brief says (p. 32):

> It appears that there were several occasions during the progress of the trial of the case that the record does not affirmatively show that the defendant was present in court in his own proper person. This is fatal to the judgment of the court, and for this error in the proceedings I submit that the judgment of the court below must be reversed and the plaintiff in error awarded a new trial.

In connection with this proposition there is no reference to any part of the record to sustain the assertion that "the record does not affirmatively show that the defendant was present in court in his own proper person" on "several occasions during the progress of the trial."

In the statement of the case (brief, p. 5) is the following:

> The record shows the following order made on April 17, 1895:
>
> THE UNITED STATES } 535.
> *v.*
> JOHN STEVENSON. }
>
> The venire of petit jurors having been exhausted by challenge, it was ordered that the marshal summon thirty talesmen to complete the jury for trial of this cause, and thereupon J. E. Bobo was duly called, examined, tried, empaneled, and sworn as a juror to try this cause.
>
> It does not appear that the defendant was present when that order was made.

On that day and under one date, as appears from an examination of the record (pp. 3 and 4), three orders were entered, probably divided up for convenience, but they are in effect one order made in the minutes together, and as of the same day, and they show that the defendant, John Stevenson, was present in his own proper person. (Rec., p. 4.)

The order of that day just preceding the one quoted does show affirmatively that the defendant was present when Bobo was called and sworn as a juror, for it says:

> This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial, and the defendant, John Stevenson, in his own proper person and by attorneys, appeared and announced ready; and the said John Stevenson, being arraigned, pleaded not guilty, and thereupon came a jury of twelve good and lawful men, to wit,

> J. H. Reeves, T. S. Gaines, J. M. Bennett, D. W. Yarbrough, W. P. Stockton, C. E. Terry, W. I. Ellett, W. T. Williamson, J. J. Rhodes, R. H. Fredericks, J. A. Carter, and J. E. Bobo, each and all of whom were severally, face to face with the defendant, duly examined, tried, empaneled, and sworn, the defendant being accorded the privilege of participating in the examination as to the qualification of each juror and to peremptorily challenge not exceeding twenty of the list, and thereupon, the jury having been duly sworn as required by law to try this cause, the hour of adjournment was at hand, and the jury was committed to the custody of the marshal and duly cautioned by the court, and the further consideration of this cause was postponed until to-morrow. (Rec., p. 4.)

On page 5 of the brief the same error is made in respect of the order of April 20, 1895, which has been heretofore pointed out.

On page 6 of the brief, following the quotation of a portion of the order, it is stated that "it does not appear certainly that the defendant was present in court when that order was made."

If the whole order is read, it does certainly appear that he was present.

It is respectfully insisted that there was no error, and the judgment should be affirmed.

J. M. Dickinson,
Assistant Attorney-General.